

CONSTITUTION OF THE REPUBLIKA SRPSKA AS OF 26 SEPTEMBER 2001^[1]

CONSTITUTION OF REPUBLIKA SRPSKA

(as of Wednesday, September 26, 2001)

Preamble (as amended by Amendments XXVI and LIV):

- Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;
 - Respecting the centuries-long struggle of the Serb people for freedom and State independence;
 - Expressing the determination of the Serb people to its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;
 - Desiring to provide the general welfare and economic development through the protection of private property and the promotion of a market economy;
 - Recognizing the natural and democratic right, will and determination of the Serb people from Republika Srpska to link its State completely and tightly with other States of the Serb people;
 - Having in mind the readiness of the Serb people to pledge for peace and friendly relations between peoples and States;
- the National Assembly of Republika Srpska passes

CONSTITUTION OF REPUBLIKA SRPSKA

I. BASIC PROVISIONS

Article 1

Article 1 has been replaced by Amendment XLIV, reading as follows:

“Republika Srpska shall be the State of Serb people and of all its citizens”.

Article 2

Paragraph 1 of Article 2 has been replaced by Amendment XLV, reading as follows:

“The territory of the Republic shall be unique, indivisible and inalienable”.

Paragraph 2 of Article 2 has been replaced by Amendment LV, reading as follows:

“The Agreement on the change of the borders between Republika Srpska and the Federation of Bosnia and Herzegovina may be taken out for the confirmation by way of a referendum in the Republic”.

Article 3

Article 3 has been replaced by Item 1 of Amendment LVI, reading as follows:

“All State functions and powers shall belong to the Republic, with exception of those which were by the Constitution of Bosnia and Herzegovina explicitly transferred to its institutions”.

Article 4

Article 4 has been replaced by Item 2 of Amendment LVI, reading as follows:

“The Republic may, according to the Constitution of Bosnia and Herzegovina, establish special parallel relations with the Federal Republic of Yugoslavia and its member republics”.

Article 5

The constitutional arrangement of the Republic shall be based upon the following:

- guarantee and protection of human freedoms and rights in accordance with international standards;
- assurance of national equality;
- social justice;
- market economy
- multi-party political system;
- parliamentary democracy and division of authority;

- free elections;
- local self-government;
- protection of the rights of ethnic groups and other minorities.

Article 6

Paragraph 1 of Article 6 has been replaced by Amendment XLVII, reading as follows:

“Citizens of the Republic shall have citizenship of Republika Srpska”.

Article 6 has been supplemented by Amendment XXX, reading as follows:

“The citizen of the Republic may not be deprived of the citizenship, exiled or extradited”.

Article 7

The Serbian language of iekavian and ekavian dialect and the Cyrillic alphabet shall be in official use in the Republic, while the Latin alphabet shall be used as specified by the law.

In regions inhabited by groups speaking other languages, their languages and alphabet shall also be in official use, as specified by law.

Article 8

The Republic shall have the flag, the coat-of-arms and the anthem.

The flag, the coat-of-arms and the wording of the national anthem shall be determined by constitutional law.

Article 9

The capital of the Republic shall be Sarajevo.

II. HUMAN RIGHTS AND FREEDOMS

Article 10

Citizens of the Republic shall be equal in their freedoms, rights and duties; they shall be equal before the law and they shall enjoy equal legal protection irrespective of their race, sex, language, national origin, religion, social origin, birth, education, property status, political and other beliefs, social status and other personal attributes.

Article 11

Human life shall be inviolable.

Death penalty may be pronounced exclusively for capital crimes.

Article 12

Freedom and personal safety of man are inviolable.

No one may be deprived of his liberty or restricted in it, save for the case and according to the procedure as specified by law.

Article 13

Human dignity, physical and spiritual integrity, personal privacy, personal and family life shall be inviolable.

Article 14

No one may be subjected to torture, cruel, inhuman or degrading treatment or punishment.

Any extortion of confession or statement shall be forbidden and punishable.

It shall be forbidden to conduct medical and other scientific experiments upon any person without his or her consent.

Article 15

Unlawful deprivation of liberty shall be punishable.

Deprivation of liberty may only last as long as there are legal conditions for it.

A person reasonably suspected of having committed an offence may be arrested and detained only when it is necessary for the purpose of the conduct of criminal proceedings or for reasons of the safety of people.

Detention shall be determined by a decision of the Court, and only as an exception, under the conditions stipulated by law, by a decision of another organ authorised by law and not later than up to three days.

The person detained has to be presented the decision explained in writing at the moment of detention. The person detained has the right to appeal against the decision.

Article 16

Everyone shall be entitled to the equal protection of his rights in the proceedings before the

court and other State bodies and organisation.

Everyone shall be guaranteed the right to appeal or other legal remedy against the decision concerning his right or interest determined by law.

Article 17

Everyone shall be entitled to a compensation for the damage inflicted on him by unlawful or irregular work of an official or a State agency or a body vested with public powers.

A person convicted unjustifiably or deprived of his liberty unlawfully or with no grounds shall have the right to rehabilitation, compensation for damage, a public apology and other rights determined by law.

Article 18

A person charged with a criminal offence shall be guaranteed a fair trial.

A person charged with a criminal offence has to be informed of the cause of accusation within the shortest period prescribed by law.

No proceedings before the court may be conducted in the absence of the accused person.

Proceedings before the court may be conducted against an accused person who is inaccessible to the court only in cases determined by law.

Article 19

The right to defence shall be guaranteed.

The right to the free choice of a defence attorney and free communication with him shall be guaranteed.

The defence attorney may not be held responsible for actions undertaken in the process of defence.

Article 20

No one may be sentenced for any act which did not constitute a criminal offence under law at the time when it was committed. Nor may the penalty be imposed which was not prescribed by law for such an act.

No one may be held guilty for a criminal offence until proved so by a final decision of the court.

Article 21

Citizens shall be guaranteed freedom of movement, residence and staying on the territory of the Republic, and the freedom to leave and return on the territory.

Freedom of movement may be restricted by law only if necessary for the purpose of the conduct of criminal proceedings or for reasons of the protection, safety and health of people.

No restrictions may be introduced for political reasons.

Article 22

In Article 22 the words: "and of Yugoslavia" (Item 4 of Amendment LVII) have been deleted:

Freedom and secrecy of correspondence and other forms of communication shall be inviolable.

Exception from the principle of inviolability of freedom and secrecy of correspondence and other forms of communication may only be prescribed by law, subject to a court decision, if it is indispensable for the purpose of the conduct of criminal proceedings or for reasons of the safety of the Republic.

Article 23

Protection of secrecy of personal data shall be guaranteed. Collection, processing and the purpose of the use of personal data shall be regulated by law.

The use of personal data contrary to the determined purpose of their collection shall be prohibited.

Citizens shall be entitled to demand and receive all data on them contained in acts of State bodies and other official registers.

Article 24

Homes shall be inviolable.

On the basis of a court warrant as prescribed by law may an official person enter a home or other premises without a consent from the tenant and carry out a search. The search shall be carried out in the presence of two witnesses.

Subject to conditions spelled out by law, an official person may without a court warrant enter a home or other premises and carry out a search, if this is indispensable to apprehend an offender or to save persons and property.

Article 25

Freedom of thought and orientation, conscience and conviction, as well as of public expression of opinion shall be guaranteed.

Article 26

Freedom of press and other media of communication shall be guaranteed.

In Paragraph 1, Article 26 the word "independent" has been replaced by the word "newspaper" (Amendment XLIII).

Free establishment of newspaper and publishing houses, publishing of newspapers and public information by other media in accordance with law shall be guaranteed.

Censorship of press and other public information media shall be forbidden.

Public information media shall be obliged to inform the public on time, truthfully and impartially.

The right to correction of incorrect information shall be guaranteed to anyone whose right or legally determined interest has been violated, as well as the right to a compensation for damage arising therefrom.

Article 27

Freedom of scientific, cultural and artistic creativity shall be guaranteed.

Protection of moral and property rights deriving from scientific, cultural, artistic and other intellectual creative creativity shall be guaranteed.

Article 28

Freedom of religion shall be guaranteed.

Religious communities shall be equal before the law and shall be free to perform religious affairs and services. They may open religious schools and perform religious education in all schools at all levels of education; they may engage in economic and other activities, receive gifts, establish legacies and manage them, in conformity with law.

The Serbian Orthodox Church shall be the church of the Serb people and other people of Orthodox religion.

The State shall materially support the Orthodox church and it shall co-operate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values.

Article 29

A citizen who has reached the age of eighteen years shall have the right to vote and to be elected.

The right of suffrage shall be universal and equal, elections shall be direct and by secret ballot.

Article 29 has been amended by Item 5 of Amendment LVII, reading as follows:

"A person shall acquire the right of suffrage, subject to Article 29, after having resided in a certain place for the period determined by law."

Article 30

Citizens shall have right to peaceful assembly and public protest.

Freedom of association shall be restricted by law only for the purpose of protection of the safety of persons and property.

Article 31

Freedom of political organisation and activities in conformity with law shall be guaranteed.

Political organisation and activities threatening democracy, jeopardising integrity of the Republic and violating constitutionally guaranteed freedoms and rights and inciting national, racial or religious hatred and intolerance shall be prohibited.

Article 32

Citizens shall have the right to publicly express their opinion on the work of State agencies and other bodies, to submit petitions, complaints and proposals to them and to receive answers thereto.

No one may be held responsible or suffer other adverse consequences because of the public expression of his opinion on the work of State agencies or his statements publicly presented in a complaint, petition and proposal, unless thus committing a criminal offence.

Article 33

Citizens shall have the right to take part in the conduct of public affairs and have access to public service under equal conditions.

people service under equal conditions.

Article 34

Citizens shall be guaranteed freedom of profession of national affiliation and culture and the right to use their language and alphabet.

No one shall be obliged to declare national affiliation.

Paragraph 3 of Article 34 has been deleted on the basis of Item 6 of Amendment LVII.

Article 35

Everyone shall have the right to a healthy environment. Everyone shall be bound, in accordance with law and within his possibilities, to protect and improve the environment.

Article 36

The family, mother and child shall enjoy special protection.

Marriage and legal relations in marriage and family shall be regulated by law.

Everyone shall have the right to decide freely to have children.

Parents shall have the right and duty to take care of the upbringing and education of their children.

Children shall be bound to take care of their parents needing help.

Children born out of wedlock shall have the same rights and duties as those born in wedlock.

Minors who are parentally neglected and persons unable to look after themselves and the protection of their rights and interests shall enjoy special protection.

Article 37

Everyone shall be entitled to health care.

The right to health care shall be guaranteed in conformity with law.

Children, pregnant women and elderly persons shall be entitled to health care financed out of the public funds, while other persons shall enjoy such a care under the conditions spelled out in a law.

Article 38

Everyone shall be entitled to education under equal conditions.

Primary schooling shall be compulsory and free.

Everyone shall have access, under the same conditions, to secondary and higher education.

In Paragraph 4 of Article 38 the words "teaching institutions" have been deleted (Item 2 of Amendment XLIII).

Citizens may open private schools under conditions specified by law.

Article 39

Everyone shall have the right to work and to freedom of work.

Forced labour shall be prohibited.

Everyone shall be free to choose his vocation and occupation and all work places and duties shall be accessible to everyone under the same conditions.

Employment may be terminated contrary to the will of employed persons in the manner and under conditions specified by law and collective agreements.

Every employed person shall have the right to remuneration in accordance with law and collective agreements.

Article 40

Employed persons shall be entitled to limited working hours, daily and weekly rest and annual holiday and leave with pay, in accordance with law and collective agreements.

Employed persons shall have the right to safety at work, in accordance with law.

Young people, mothers and disabled persons shall be entitled to special protection at work.

Article 41

Freedom of forming trade unions and organisation and activities related to them shall be guaranteed.

Article 42

Employed persons shall have the right to strike under conditions specified by law.

Article 43

The right of employed persons and of members of their families to social security and social insurance shall be regulated by law and collective agreements.

The right to relief during temporary unemployment shall be guaranteed, under conditions specified by law.

Citizens who are partially disabled shall be guaranteed the training for a suitable job and are

Citizens who are partially disabled shall be guaranteed the training for a suitable job and are provided conditions for their employment, in accordance with law.

The Republic shall ensure the assistance and social security to citizens incapable to work and unprovided-for.

Article 44

Aliens shall have the human rights and freedoms determined by the Constitution and other rights specified by law and international agreements.

Foreign citizens and Stateless persons may be granted asylum in Republika Srpska if prosecuted for the participation in movements for social and national emancipation, supporting democracy, human rights and fundamental freedoms or for the freedom of scientific and artistic creativity.

Article 45

Everyone shall be bound to abide by the Constitution and law.

Everyone shall be bound to perform conscientiously and responsibly the public function assigned to him.

Article 46

Everyone shall be bound to assist a person in danger and to take part in elimination of general danger.

Article 47

Article 47 has been deleted on the basis of Item 7 of Amendment LVII.

Article 48

The rights and freedoms guaranteed by this Constitution may not be denied or restricted.

Paragraph 2 of Article 48 has been deleted on the basis of Item 8 of Amendment LVII.

The court protection of the rights and freedoms guaranteed by this Constitution shall be ensured.

Everyone violating the human rights and fundamental freedoms guaranteed by this Constitution shall be held personally responsible for it and may not be justified by having obeyed somebody's order to that effect.

Article 49

Freedoms and rights shall be exercised, and duties fulfilled directly pursuant to the Constitution, unless the Constitution provides that conditions for exercising particular freedoms and rights are spelled out by law.

The manner of exercising particular rights and freedoms may be determined by law only when it is necessary for their exercise.

Paragraph 3 of Article 49 has been replaced by Item 3 of Amendment XXXV.

The Chapter on Human Rights and Fundamental Freedoms has been supplemented by Items 1 through 3 of Amendment LVII, reading as follows:

“In the case there are differences between the provisions on rights and freedoms of the Constitution of Republika Srpska and those of the Constitution of Bosnia and Herzegovina, the provisions which are more favourable for the individual shall be applied.

The provisions of Articles 10, 21, 30, 32, 33, 34, 38 and 43 of the Constitution on rights and freedoms of citizens shall be considered the provisions on human rights and fundamental freedoms and shall apply to all, not only to citizens.

The provisions of Articles 13, 22, 23, 24, 25, 26, 28 and 30 of the Constitution on rights and freedoms shall be exercised in conformity with related provisions of Articles 8 through 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

III. ECONOMIC AND SOCIAL ORDER

Article 50

The economic and social order shall be based on the equality of all forms of ownership and free enterprise, the independence of enterprises and other forms of organisation on management and appropriation of profit and free movement of goods, labour and capital in the Republic as a single economic territory.

Article 51

Through measures of economic and social policy the Republic shall stimulate the economic development and the increase of social welfare of citizens.

Article 52

Free enterprise may exceptionally be restricted by law for the purposes of protecting the interest of the Republic, the human environment, health and security of people.
Monopolies shall be forbidden.

Article 53

The Republic shall ensure consumers protection.

Article 54

All forms of ownership shall enjoy the equal protection of law.

Article 55

The right to inheritance shall be guaranteed in accordance with law.

Article 56

The right to ownership may be restricted or taken away by law against fair indemnity.

Article 56 has been supplemented by Item 1 of Amendment XXXI, reading as follows:

“During the state of war, the imminent war threat or the state of emergency, law may restrict the disposal of or define a special method of the use of a part of assets belonging to legal and natural persons.”

Article 57

Article 57 has been replaced by Amendment XLVIII, reading as follows:

“Foreign persons may acquire the right to property and the rights through the investment of capital in accordance with law.

Property and other rights of a foreign investor acquired through the capital invested may not be lessened or denied by law nor by any other legal act.

Foreign persons shall be guaranteed to conduct economic or any other activities and rights arising from business transfers under the conditions which cannot be changed to his detriment.

Foreign investors shall be guaranteed to take freely the profit and the invested capital out of the Republic.

The establishment of private enterprises by foreign persons concerning certain activities and fields may exceptionally be restricted by law when required by the general social interest.

Article 58

Property rights and obligations relating to socially-owned resources and the conditions of transforming the resources into other forms of ownership shall be regulated by law.

Paragraph 2 of Article 58 has been replaced by Item 2 of Amendment XXXI, reading as follows:

Socially- or State-owned property may as a rule be alienated only according to the market criteria.

Article 59

Natural resources, urban construction sites, real estate and property of particular economic, cultural and historical significance determined by law to be of general interest, shall be State-owned.

Certain goods of general interest may also be privately owned under the conditions determined by law.

Under the conditions determined by law, the right of use may be instituted on property of general interest as well as on urban construction sites.

The use and exploitation of property of special cultural, scientific, artistic or historical significance, or significant for the protection of nature or the environment, may be restricted against a full compensation to the owner.

The protection, use, improvement and management of the property of general interest, as well as the payment of compensation for the use of property of general interest and urban construction sites shall be regulated by law.

Article 60

Natural and legal entities shall exercise their ownership rights to real estate according to its nature and purpose and in accordance with law.

The ownership of farming land shall be guaranteed, while the framework of ownership of forests and forest land shall be specified by law.

Article 61

The Republic shall guarantee to citizens a minimum of social security and it shall provide for functioning of public services, in accordance with law.

Public services shall be financed through funds and budgets, in accordance with law.

Article 62

The Republic and municipalities shall establish public revenues and expenditures by means of a budget.

Budget resources shall be raised from taxes, fees and other levies specified by law.

Article 63

The duty to pay taxes and other levies shall be universal and it shall be defined in accordance with taxpayer's income bracket.

Article 64

The Republic shall protect and encourage the following:

- the rational use of natural resources with the view of protecting and improving the quality of life and protecting and reviving the environment to the general benefit;
- conservation and enrichment of historical, cultural and artistic wealth;
- scientific research;
- economising of all kinds, in particular the one pertaining to economic activities and the purchase of apartments;
- co-operative societies and general co-operation;
- crafts;
- physical culture and sports.

Article 65

Employees shall have the right to participate in the company management in accordance with law.

The citizens' influence on the management of State-owned funds and property shall be specified by law.

IV. RIGHTS AND DUTIES OF THE REPUBLIC**Article 66**

The rights and duties of the Republic shall be exercised by the republican bodies specified by the Constitution.

Human rights and freedoms, the equality before the law, the independence and the equal status of enterprises and other organisations, the constitutional status and the rights of local self-government units shall be the basis and the measurement for powers and responsibilities of republican bodies.

Article 67

Within the rights and duties of the Republic laid out by the Constitution, the republican bodies shall formulate the policy, enact and enforce laws, other regulations and general acts and carry out the protection of the constitutionality and legality.

The bodies and organisations in municipalities may be assigned the enforcement of laws and other regulations and general acts from within the framework of the rights and duties of the Republic.

The responsibility for the enforcement of laws, other regulations and general acts shall be regulated by law.

Article 68

Article 68 has been replaced by Amendment XXXII, reading as follows:

“The Republic shall regulate and ensure:

1. integrity, constitutional order and territorial unity of the Republic;

In Sub-item 1 of Amendment XXXII the words: “sovereignty, independence” have been replaced by the words: “integrity, constitutional order” (Item 1 of Amendment LVIII).

2. defence and security;

3. measures in case of the state of, imminent threat of war and the state of emergency;

4. constitutionality and legality;

5. implementation and protection of human rights and freedoms;

6. property and obligation relations and protection of all forms of property, legal status of enterprises and other organisations, their associations and chambers, economic relations with foreign countries, which have not been transferred to institutions of Bosnia and Herzegovina, market and planning;

In Sub-item 6 of Amendment XXXII after the words: "economic relations with foreign countries" the words: "which have not been transferred to institutions of Bosnia and Herzegovina, market and planning" (Item 2 of Amendment LVIII) have been added.

7. banking and tax system;

In Sub-item 7 of Amendment XXXII, the words: "monetary", "foreign exchange" and "customs" have been deleted (Item 3 of Amendment LVIII).

8. main objectives and directions of economic, scientific, technological, demographic and social development, the development of agriculture and the village, the use of space, politics and measures for direction of the development and commodities;

9. control of legality of the disposal of means of legal entities and the collection of statistical and other data of general interest;

10. organisation, competence and the work of State bodies;

11. public services system;

12. work relations, safety at work, employment, social insurance and other forms of social care, health care, soldiers and invalid protection, child and youth care, education, culture and cultural resources protection, physical culture;

13. environmental protection;

14. public information system;

15. international co-operation, with the exception of the one transferred to institutions of Bosnia and Herzegovina.

In Sub-item 15 of Amendment XXXII, the words: "with the exception of the one transferred to institutions of Bosnia and Herzegovina" (Item 4 of Amendment LVIII) have been added.

16. co-operation with the Serb people outside of the Republic;

17. financing the exercise of the rights and duties of the Republic;

18. other relations relevant for the Republic, in accordance with the Constitution".

V. ORGANISATION OF THE REPUBLIC

Article 69

The State government in the Republic shall be organised according to the principle of the separation of powers.

The constitutional and legislative powers shall be exercised by the National Assembly.

Paragraph 3 of Article 69 has been replaced by Amendment XXXII, reading as follows:

"The Republic is represented and its national unity symbolised by the President of the Republic."

The executive power shall be vested in the Government.

The judicial power shall belong to the courts.

The protection of constitutionality and legality shall be provided by the Constitutional Court.

1. The National Assembly

Article 70

The National Assembly shall:

1. decide on amending the Constitution;
2. enact laws, other regulations and general enactments;
3. adopt a development plan, urban plan, budget and annual balance sheet;
4. determine the territorial organisation of the Republic;
5. call for the republic referendum;
6. float the public loan of the Republic and decide on contracting debts by the Republic;
7. call for the elections for Assembly deputies and the President of the Republic;
8. elect, appoint and dismiss the officials, in accordance with the Constitution and the laws;
9. exert control over the work of the Government and other bodies responsible to it, in accordance with the Constitution and law;
10. grant amnesty;
11. carry out other activities in accordance with the Constitution and law.

Article 70 has been supplemented by Amendment LIX, reading as follows:

"National Assembly shall:

- 1. elect delegates from the Republic to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina ;**
- 2. ratify the agreements concluded between the Republic and the states and international organisations with the consent of the Parliamentary Assembly of Bosnia and Herzegovina"**

Article 70 has been amended by Amendments XXXV and Amendment LXI, reading as follows:

"The National Assembly, in accordance with law, shall declare

- 1. the state of war in the case of an armed attack of the Republic**

2. imminent threat of war in case of a serious threat of war

3. state of emergency for the Republic or a part of Republic if the security, human rights and freedoms and normal functioning of the constitutional institutions are threatened”

Article 70 has also been amended by Item 3 of Amendment XXXV (see Article 81 of the Constitution).

Article 71

Paragraph 1 of Article 71 has been replaced by Amendment LII, reading as follows:

“The National Assembly shall have 83 deputies”

Paragraph 2 of Article 71 has been replaced by Item 2 of Amendment XXXVI, reading as follows:

“The electoral laws shall establish the electoral units and the system of the distribution /allocation of mandates ensuring that all municipalities are appropriately represented in the National Assembly.”

Assembly deputies shall be elected directly and by secret ballot.

The election and the termination of mandates of Assembly deputies and the forming of electoral units shall be determined by law.

Article 72

Assembly deputies shall be elected for a term of four years.

Article 72 has been supplemented by Amendment XXXIX and Amendment LX, reading as follows:

“At the proposal of a minimum of 30 deputies, the National Assembly may shorten its mandate by a two-thirds majority of the total number of deputies.

During the state of war and imminent threat of war, the mandate of the national Assembly shall be prolonged for the duration of such a state.

The national Assembly may not shorten its mandate during the war and imminent threat of war .

Should the National Assembly shorten its mandate or should it be dismissed, elections for a new National Assembly must be held within 60 days from the day of issuance of decision on the shortening of mandate. The elections shall be scheduled by the President of the Republic.

By the shortening of mandate of the national Assembly the mandate of the Government shall also stop.

The President of the Republic may, after he has heard the opinion of the President of the Government and the President of the National Assembly decide to dismiss the National Assembly .“

Article 73

Assembly deputies shall enjoy immunity.

An Assembly deputy may not be held criminally liable, or detained or punished for an opinion expressed or a vote cast in the National Assembly.

An Assembly deputy may not be arrested without the approval of the National Assembly, unless he has been caught while committing a criminal offence carrying a penalty of more than five years of imprisonment.

No Assembly deputy may be subject, without the approval of the National Assembly, to instituting criminal proceedings against him after he has invoked parliamentary immunity.

Article 74

The National Assembly shall sit in a continuous session.

The President of the National Assembly shall convene and chair sessions.

The President shall be obliged to convene a session upon the request of one third of the total number of deputies, or on the demand by the President of the Republic or the Government.

Article 75

Article 75 has been replaced by Amendment XXXVII, reading as follows:

“The National Assembly shall decide by a majority vote of all Assembly deputies, unless the Constitution provides a special majority.”

Article 76

Article 76 has been replaced by Amendment XXXVIII, reading as follows:

“The President of the Republic, the Government, every Assembly deputy or a minimum of 3,000 voters shall have the right to propose laws, other regulations and general enactments.

The National Bank shall also have the right to propose laws, other regulations and general enactments relating to monetary, foreign exchange and credit system ”

general enactments relating to monetary, foreign exchange and credit system.

Article 77

The National Assembly may decide to make a decision on some issues falling within its competence after a referendum of citizens has been held.

Article 78

The National Assembly shall regulate its work and organisation and the manner of exercising the rights and duties of deputies.

Article 79

The National Assembly shall have the President and two Vice-Presidents elected for a four year term.

2. The President of the Republic

Article 80

The President of the Republic shall:

1. represent the Republic;
2. propose to the National Assembly a candidate for the Prime Minister;
3. propose to the National Assembly candidates for the president and judges of the Constitutional Court;

Item 4 of Paragraph 1 of Article 80 has been substituted by Item 2 of Amendment XL, reading as follows:

4. **“the President of the Republic shall promulgate laws by decree within seven days from the day of their adoption by the National Assembly. The President of the Republic may, within that timeline, request that the National Assembly make decision on the law anew.**

The President of the Republic is obliged to promulgate the law which has been readopted by the National Assembly”;

5. grant pardons;
6. confer decorations and awards specified by law;
7. perform other tasks in accordance with the Constitution;

Article 80 has been supplemented with Item 1 of Amendment XL, reading as follows:

“The President of the Republic shall:

- 1) **perform, in accordance with the Constitution and law, tasks related to defence, security and relations of the Republic with other countries and international organisations,**

Sub-item 2 of Item 1 of Amendment XL has been substituted by Amendment L, reading as follows:

- 2) **the President of the Republic shall, at the proposal of the Government, by decree appoint and recall heads of missions of Republika Srpska in foreign countries, and shall nominate ambassadors and other international representatives of Bosnia and Herzegovina from Republika Srpska.**
- 3) **form advisory bodies and expert agencies for performing tasks falling within his competence.”**

Vice-Presidents of the Republic shall assist the President of the Republic in performing tasks entrusted to them by the President of the Republic.

Paragraph 3 of Article 80 has been substituted by Item 3 of Amendment XL, reading as follows:

“The President of the Republic shall decide which of the vice-presidents of the Republic shall replace him in case he is temporary prevented from performing his duties.”

Article 81

When the National Assembly, due to a State of emergency, is not able to convene, the President of the Republic shall, upon obtaining the opinion of the Government, establish the existence of the State of emergency and order that measures be taken for their remedy, in accordance with the Constitution and law.

Paragraph 2 of Article 81 has been substituted by Item 2 of Amendment XXXV reading as follows:

“If not possible to convene a session of the National Assembly, which is ascertained on the basis of a statement given by the President of the National Assembly, a state of war or imminent threat of war shall be declared by the President of the Republic.

If the National Assembly cannot convene during a state of war or imminent threat of war, the President of the Republic shall, at the proposal of the Government or at his own initiative after he has heard the opinion of the President of the National Assembly,

pass decrees with the force of law regarding the issues falling under the competence of the National Assembly, and appoint and recall officials which are normally appointed and recalled by the National Assembly.

The President of the Republic shall submit these decrees or decisions on the appointment and recall for approval to the National Assembly as soon as it is able to convene.

Article 81 has been supplemented with Item 3 of Amendment XXXV, reading as follows:

Exceptionally, during a state of war or imminent threat of war, enactments passed by the National Assembly, i.e. enactments by the President of the Republic in case the National Assembly could not convene, may, while such State is in effect, suspend certain provisions of the Constitution relating to the adoption of laws, other regulations and general enactments, to the undertaking of measures by republican bodies, and to certain human freedoms and rights, except for the freedoms and rights laid down in Articles 10, 11, 13, 14, 15, 17, 18, 19, 20, 24 and 25 of the Constitution, change the organisation and powers of executive, managing and judicial bodies and their personnel, as well as the territorial organisation in the Republic.

Article 82

The President of the Republic may request that the Government presents its stance on certain issues of importance for the Republic, convene a session of the Government and put on the agenda issues falling under its competence.

Article 83

Article 83 has been substituted by Items 4 and 5 of Amendment XL, reading as follows:

Only one Vice-President of the Republic shall be elected at the first direct elections.

The President and Vice-President of the Republic shall be elected for a five-year mandate by the citizens through direct and secret ballot.

The President and Vice-President of the Republic shall be elected simultaneously from the same list of candidates.

The same person may be elected President or Vice-President of the Republic no more than twice in a row.

Article 84

When assuming the office, the President of the Republic and the Vice-Presidents of the Republic shall take an oath before the National Assembly.

Article 85

In case of an imminent threat of war or state of war, the mandate of the President of the Republic shall be extended as long as such state is in effect, i.e. until conditions are created for the election of the President of the Republic.

Article 85 has been supplemented with Item 6 of Amendment XL, reading as follows:

Provisions set forth in Articles 85 through 89 of the Constitution, concerning the President of the Republic, shall also apply to the Vice-President of the Republic.

Article 86

The President of the Republic shall enjoy the same immunity as the Assembly deputies.

Article 86 has been supplemented with Item 6 of Amendment XL, reading as follows:

“Provisions set forth in Articles 85 through 89 of the Constitution, concerning the President of the Republic, shall also apply to the Vice-President of the Republic.”

Article 87

The term of office of the President of the Republic shall cease before the expiry of the period he was elected for, in case of his resignation or recall.

Article 87 has been supplemented with Item 6 of Amendment XL, reading as follows:

“Provisions set forth in Articles 85 through 89 of the Constitution, concerning the President of the Republic, shall also apply to the Vice-President of the Republic.”

Article 88

The President of the Republic shall be responsible to citizens and they can recall him following the same procedure by which they elected him.

Article 88 has been supplemented with Item 6 of Amendment XL, reading as follows:

“Provisions set forth in Articles 85 through 89 of the Constitution, concerning the President of the Republic, shall also apply to the Vice-President of the Republic.”

Article 89

The procedure for nominating, electing and recalling the President of the Republic shall be

regulated by the law.

Article 89 has been supplemented with Item 6 of Amendment XL, reading as follows:

“Provisions set forth in Articles 85 through 89 of the Constitution, concerning the President of the Republic, shall also apply to the Vice-President of the Republic.”

Provisions set forth in the Constitution concerning the President of the Republic have been supplemented with Amendment LIII, reading as follows:

“The advisory body of the highest constitutional institutions in Republika Srpska shall be the Senate.

The Senate shall discuss issues of particular importance for the political, national, economic and cultural development of Republika Srpska, and shall forward its opinion to the highest constitutional institutions concerning the issues falling within their competence.

The Senate shall consist of 55 members appointed by the President of the Republic.

Appointed Senate members shall be distinguished persons from public, scientific and cultural life.

The Senate members shall enjoy the same immunity as the Assembly deputies.

Sessions of the Senate shall be convened and chaired by the President of the Republic.

The Organisation and the mode of operation of the Senate shall be regulated by law.”

3. The Government and the Administration of the Republic

Article 90

The Government shall:

1. propose laws, other regulations and general enactments;
2. propose the development plan, urban plan, budget and the annual balance sheet;
3. ensure the implementation and enforce the laws, other regulations and general enactments;
4. pass decrees, decisions and other enactments necessary for the enforcement of law;
5. express its opinion on drafts of laws, other regulations and general enactments submitted to the National Assembly by another proposer;
6. define principles of the internal organisation of the ministries and other administrative bodies and organisations of the Republic, appoint and recall officials at the ministries, other bodies and administrative organisations of the Republic;
7. guide and co-ordinate the work of ministries and other bodies and administrative organisations of the Republic;
8. carry out supervision of the work of the ministries and other bodies and administrative organisations of the Republic, and annul or cancel their enactments which are in contravention of law or some other regulation passed by the Government
9. carry out other tasks in accordance with the Constitution and law.

Article 90 has been supplemented with Item 1 of Amendment XLI and changed by Amendment LXI, reading as follows:

“The Government shall decide on the establishment of the Republic’s missions abroad.”

Article 91

The Government shall be elected for a term of four years.

A new Government shall be elected each time a new National Assembly is elected.

Article 92

The Government shall consist of the Prime Minister, Deputy Prime Minister and ministers.

Paragraph 2 of Article 92 has been substituted by Item 2 of Amendment XLI, reading as follows:

“A member of the Assembly who has been nominated for the post of Prime Minister, Deputy Prime Minister or Minister cannot take part in deciding on the election of Government, while a member of the Assembly who has been elected to those positions cannot take part in a vote of no confidence to the Government, in a vote on his recall, on a report made by the Government or the ministry he runs.”

Article 93

The candidate for the Prime Minister shall present his program to the National Assembly and propose a list of ministers of the Government.

The Government shall be elected if the majority of the total number of deputies of the Assembly have voted for it.

Article 94

The Government and its members shall be responsible to the National Assembly.

The National Assembly may vote no confidence to the Government.

The proposal for a no confidence vote to the Government may be submitted by at least 20 representatives.

The Government itself may ask for a vote of confidence at the National Assembly.

The Prime Minister may propose to the National Assembly a dismissal of individual members of the Government.

A decision on the dismissal of the Government or any of its members shall be considered adopted if it has been voted by the majority of the total number of deputies.

The Government and each of its members may submit their resignations to the National Assembly.

The resignation or dismissal of the Prime Minister shall entail the resignation of the entire Government.

A Government which has been voted no confidence, which has resigned or whose mandate has been revoked because of dissolution of the National Assembly, shall remain in office until a new Government is elected.

Article 94 has been supplemented with Items 3, 4 and 5 of Amendment XLI, reading as follows:

“The President of the Republic shall propose a candidate for the Prime Minister within 10 days from the day his resignation was accepted, no confidence voted or the mandate of the previous Government expired due to the dissolution or the shortening of the mandate of the National Assembly. The new Government must be elected within 40 days from the day the candidate for the new Prime Minister was nominated.

During the mandate of the Government, the Prime Minister may, based on the opinions of the President of the Republic and the President of the National Assembly, make changes in the composition of the Government, of which he shall inform the National Assembly.

If he assesses that there has been a crisis in the work of the Government, the President of the Republic may, at the initiative of at least 20 Assembly representatives and after obtaining the opinion of the President of the National Assembly and the Prime Minister, demand that the Prime Minister resigns. Should the Prime Minister refuse to resign, the President of the Republic may dismiss him.

During a state of war or imminent threat of war, the National Assembly may vote no confidence to the Government by the majority of votes at the session attended by the majority of the deputies.

Article 95

Members of the Government shall enjoy the same immunity as the Assembly deputies.

The immunity of the members of the Government shall be decided upon by the Government.

Article 96

The organisation and mode of operation of the Government shall be regulated by law.

Article 97

The affairs of the State administration shall be conducted by the ministries and other administrative bodies of the Republic.

The ministries and other administrative bodies of the Republic shall implement laws and other regulations and general enactments of the National Assembly and Government, as well as enactments by the President of the Republic, shall decide in administrative matters, carry out supervision and other administrative affairs prescribed by law.

The ministries and other administrative bodies of the Republic shall be independent in exercising their competencies prescribed by the Constitution and law.

Certain administrative powers may be entrusted by law to enterprises and other organisations.

4. The National Bank

Article 98

The Republic shall have a National Bank.

The status, organisation, management and operation of the National Bank shall be regulated by law.

5. Agency for Payment Operations and Financial Control

Article 99

The Republic shall have an Agency for Payment Operations and Financial Control.

The status, organisation, management and operation of the Agency for Payment Operations and Financial Control shall be regulated by law.

VI. TERRITORIAL ORGANIZATION

Article 100

The territorial organisation of the Republic shall be regulated by law.

Article 101

(Article 101 has been deleted by Amendment XXXII)

Article 102

The municipality shall, through its bodies, and in accordance with the law:

1. enact a development program, urban planning, budget and annual balance sheet;
2. regulate and ensure performing of the municipal activities;
3. regulate and ensure the use of urban construction sites and business premises;
4. take care of construction, maintenance and use of local infrastructure, and other public facilities of importance to the municipality;
5. take care of meeting specific needs of citizens in the areas of culture, education, health and social welfare, physical culture, public information, handicrafts, tourist trade and catering services, environment protection and other areas;
6. execute laws, other regulations and general enactments of the Republic whose execution is entrusted to the municipality, provide for the execution of regulations and general enactments of the municipality;
7. establish agencies, organisations and services to meet the needs of the municipality, and regulate their organisation and work;
8. attend to other business as established by the Constitution, the law and the statute of the municipality.

The system of local government shall be regulated by law.

The performance of tasks of local government may be entrusted to the city by law.

Article 103

The city and municipality shall be entitled to revenues as established by law, and resources for administering the tasks entrusted to them.

VII. DEFENCE**Article 104**

The defence and protection of the territory and constitutional order of Republika Srpska is the right and duty of all citizens.

The words "sovereignty" and "independence" have been deleted from Paragraph 1 of Article 104 (Amendment LXIII).

The rights and duties regarding defence shall be set out in a separate law.

Article 105

Republika Srpska shall have its own Army, consisting of standing units and reserve units.

Permanent units shall consist of professional soldiers and soldiers serving the Army.

A separate law shall be passed on the Army of the Republika Srpska.

Article 106

At war and at peace time, the Army of Republika Srpska shall be commanded by the President of the Republic, according to the Constitution and law.

The President of the Republic shall nominate, promote and recall the officers of the Army of Republika Srpska in accordance with law, he shall nominate and recall the president, judges and members of the jury of the military courts as well as the Army prosecutors.

Article 107

Military courts and Army prosecutors shall be established by law.

Military courts shall be independent and shall adjudicate in accordance with the law.

VIII. CONSTITUTIONALITY AND LEGALITY**Article 108**

P> Laws, statutes, other regulations and general enactments must be in conformity with the Constitution.

Regulations and other general enactments must be in conformity with the law.

Article 109

Laws, other regulations and general enactments shall enter into force not earlier than on the eighth day after the day of their publication, unless, for particularly justified reasons, it is stipulated that they enter into force at an earlier date.

Before entering into effect, laws, other regulations and general enactments of State agencies shall be published in an appropriate official gazette

shall be published in an appropriate official gazette.

Article 110

Laws, other regulations and general enactments may not have retroactive effect.

If so required by public interest established in the procedure of enactment of the law, the law may stipulate that some of its provisions shall have a retroactive effect.

Punishable offences shall be prescribed and punishments for their commission pronounced according to law or other regulation which was in force at the time of the commission of the offence, unless the new law, i.e. regulation, is more favourable for the perpetrator.

Article 111

State agencies and organisations exercising public powers may decide in individual cases on rights and duties of citizens or, apply coercive measures and restrictions only in a procedure prescribed by law, in which everyone is provided with the opportunity to defend his rights and interests and to appeal against the issued act or apply any other legal remedy prescribed by law.

Article 112

In the proceedings before a court or other State agency or organisation which, in exercise of public powers rules on his rights and duties, each person shall be guaranteed the right to use his own language and to familiarise himself with the facts of the proceedings in his language.

Article 113

An appeal may be lodged with a competent body against the individual rulings issued in the first instance by judicial, administrative and other State bodies, as well as by organisations exercising public powers.

Exceptionally, an appeal may be disallowed by law if the right to legal remedy and protection of legality have been secured in some other way.

The legality of final and binding individual acts by which State agencies and organisations exercising public powers decide on rights and duties, shall be decided upon by a court in the administrative dispute proceedings, unless another kind of judicial protection has been provided for the specific matter.

By way of exception, the administrative dispute proceedings may be excluded only by law in specific kinds of administrative matters.

Article 114

The Government of the Republic shall have the right to suspend the implementation of a regulation, a general or individual enactment, which it considers to be unconstitutional or unlawful, until the Constitutional Court has reached a decision.

The Republic shall have the right and duty to ensure the enforcement of laws and other regulations directly through the agencies of the Republic, if the agencies and organisations of the Republic do not enforce them themselves.

IX. THE CONSTITUTIONAL COURT

Article 115

The Constitutional Court shall decide on:

1. conformity of laws, other regulations and general enactments with the Constitution;
2. conformity of regulations and general enactments with the law;
3. conflict of jurisdictions between bodies of legislative, executive and judicial branch;

In Item 4 of Paragraph 1 of Article 115 the word "region" has been deleted (Item 3 of Amendment XLIII,).

4. conflict of jurisdiction between agencies of the Republic, city and municipality;
5. conformity of programmes, statutes and other general enactments of political organisations with the Constitution and the law.

Article 115 has been supplemented with Items 1 and 2 of Amendment XLII, reading as follows:

"The Constitutional Court shall monitor events of interest for the achievement of constitutionality and legality, and inform the highest constitutional bodies of the Republic on the status and problems in that area, offering them opinions and proposals for adopting laws and undertaking other measures for the purpose of ensuring constitutionality and legality, as well as the protection of freedoms and rights of citizens, organisations and communities.

The Constitutional Court may assess the constitutionality of laws and both the constitutionality and legality of regulations and general enactments which have ceased to be effective, provided that not more than one year has elapsed from the date of the

cessation or validity to the date of initiating the proceedings.

Article 116

The Constitutional Court shall have seven judges.

Constitutional Court judges shall be elected for the period of eight years, and may not be re-elected.

The same person may not be elected twice to the office of the president of the Constitutional Court.

Article 117

A judge of the Constitutional Court may not hold another public function.

Paragraph 2 of Article 117 has been substituted by Item 5 of Amendment XLII, reading as follows:

The President and judges of the Constitutional Court shall enjoy the same immunity as the Assembly deputies. The Constitutional Court shall decide on immunity.

Article 118

A judge of the Constitutional Court shall terminate his office at his own request.

Paragraph 2 of Article 118 has been substituted by Item 6 of Amendment XLII, which reads:

A judge of the Constitutional Court shall be relieved of his duty if he is convicted of a crime which makes him unworthy of performing his function, if he becomes permanently incapable of performing the function, as well as due to other reasons prescribed by the Constitution and law.

Article 119

The decisions of the Constitutional Court are universally binding and enforceable **in the territory of the Republic.**

The words "in the territory of the Republic" have been added after the word "enforceable" in Paragraph 1 of Article 119 (Amendment LXIV).

The execution of the decisions of the Constitutional Court shall be ensured by the Government.

Article 120

The proceedings before the Constitutional Court, the legal effect of its decisions and other issues regarding its organisation and work shall be regulated by law.

Article 120 has been supplemented with Items 3 and 4 of Amendment XLII, reading as follows:

"Anyone can give an initiative to start the proceedings for assessing the constitutionality and legality.

Proceedings with the Constitutional Court may, without restriction, be initiated by the President of the Republic, by the National Assembly and by the Government, while other bodies, organisations and communities may do so under conditions prescribed by law.

The Constitutional Court may initiate the proceedings itself to assess the constitutionality and legality.

When the Constitutional Court assesses that a law is not in accordance with the Constitution, or that another regulation or general enactment is not in accordance with the Constitution or law, such law, regulation or general enactment shall cease to be effective on the day of the publication of the Constitutional Court's decision."

X. COURTS AND PUBLIC PROSECUTOR'S OFFICES

Article 121

Judicial power shall be exercised by courts.

The courts shall be autonomous and independent and shall adjudicate on the basis of the Constitution and laws.

The courts shall protect human rights and freedoms, the established rights and interests of legal subjects and legality.

Article 122

The establishment and jurisdiction of courts, as well as the procedure before the courts, shall be specified by law.

Article 123

The Supreme Court of the Republic, as the highest court in the Republic, shall ensure a unified enforcement of law.

Article 124

Court hearings shall be public.

The public may be excluded from a court hearing in the cases specified by the law for the purpose of protecting special interests of the Republic, preserving a secret, protecting moral and interest of juveniles, private life of the parties to the proceedings and protecting other public interest.

Article 125

The court shall sit in panels.

Matters to be adjudicated by a single judge shall be specified by law.

Lay judges shall also take part in the trial, in a manner prescribed by the law.

It may be prescribed by law that in specific courts and in particular matters only judges shall participate in adjudication.

Article 126

No one participating in the trial shall be held responsible for an opinion expressed in the passing of a court decision, nor can anyone be detained in proceedings instituted because of a criminal offence committed in performing the judicial function without the approval of the National Assembly.

Article 127

Judges shall have life tenure.

A judge may not hold a public office or a job defined by law as incompatible with the judicial function.

A judge's term of office shall terminate:

1. at his own request;
2. when he meets the requirements for retirement;
3. if he has permanently lost the working capacity to perform his judicial function;
4. if he has been convicted of a crime which makes him unworthy of performing the judicial function.

A judge shall be entitled to file a request for protection with the National Assembly, against the decision whereby his term of office was terminated.

Article 128

Public prosecutor's office is an independent State body which prosecutes the perpetrators of criminal offences and other criminal acts which are punishable under the law, and applies legal remedies in order to protect constitutionality and legality.

The establishment, organisation and jurisdiction of a public prosecutor's office shall be regulated by the law.

A public prosecutor's office performs its function on the basis of the Constitution and law.

Article 129

A public prosecutor shall have a life tenure.

A public prosecutor may not engage in a service or job defined by law as incompatible with his function.

Article 130

Judges and public prosecutors are elected or appointed and recalled by the National Assembly.

Article 131

Law practice shall be an autonomous and independent activity and service which renders public assistance.

The organisation and work of law practice shall be regulated by the law.

XI. AMENDING THE CONSTITUTION**Article 132**

A proposal to amend the Constitution of the Republic may be submitted by the president of the Republic, the Government, and at least 30 deputies of the National Assembly.

A proposal to amend the Constitution shall be decided upon by the National Assembly by the majority of votes of the deputies.

Article 133

Draft Amendment to the Constitution shall be set forth by the National Assembly by the

majority of votes of the total number of deputies.
Draft Amendment to the Constitution shall be open for a public debate.

Article 134

After a public debate on the Draft Amendment to the Constitution has been held, the National Assembly Commission for Constitutional Issues shall set forth a Proposal Amendment to the Constitution.

Article 135

The National Assembly shall decide on a proposed Draft Amendment to Constitution.
The Constitutional Amendment shall be considered as adopted if at least two thirds of the total number of deputies have voted for it.
If the Constitutional Amendment has not been adopted, a proposal for amendment regarding the same issue may not be repeated before three months have passed from the day when the proposal was rejected.

Article 136

The Amendment to the Constitution shall be promulgated by the National Assembly.

Article 137

The Constitution of the Republic may be amended by constitutional amendments.
In case of a state of war or an imminent threat of war, the National Assembly may draft a proposal to amend the Constitution and adopt constitutional amendments at the same session (without holding a public debate).

XII. FINAL PROVISIONS

Article 138

Article 138 has been substituted by Amendment LI and supplemented with Amendment LXV, reading as follows:

“When enactments of the institutions of Bosnia and Herzegovina or enactments of the Federation of Bosnia and Herzegovina, in contravention of the Constitution of Republika Srpska and the Constitution of Bosnia and Herzegovina, violate the equality of Republika Srpska, or when its rights and lawful interests are otherwise endangered without any protection being provided, agencies of the Republic shall temporarily, pending a decision of the Constitutional Court of Bosnia and Herzegovina, and in cases when irredeemable detrimental consequences might occur, pass enactments and undertake measures for the protection of rights and interests of the Republic.”

Article 139

This Constitution shall enter into force on the day of its promulgation.
<B< B>
A constitutional law shall be enacted for the enforcement of this Constitution.

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^[1] *The amendments to the Constitution, which were adopted on 19 April 2002, are not included. See doc. [CDL\(2002\)91](#).*



Disclaimer

**Government of Republika Srpska Post-Election Priorities: Economic Growth;
Restoration of Constitutional and Democratic Government; European Integration**

**Fourth Report of Republika Srpska
to the UN Security Council**

December 2010

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I. Introduction

1. On October 3, 2010, voters in the Republika Srpska (“RS”), one of the two Entities that comprise Bosnia and Herzegovina (“BiH”), elected a new National Assembly and President of Republika Srpska, continuing an unbroken succession of free and fair elections in the 15 years since the Dayton Accords. The next four years are considered by the RS to be a period of great importance in which much progress can be achieved. This report outlines three areas of priority of the RS Government as it looks to the future: encouraging economic growth, restoring constitutional and democratic government to Bosnia and Herzegovina, and advancing BiH’s European integration. The United Nations Security Council and members of the international community can best assist further progress within BiH by supporting these priorities in a manner that respects BiH’s sovereignty and the rule of law.

A. Economic Growth

2. Economic growth is one of the highest priorities of the RS Government and should be the primary focus of the international community with respect to its relations with BiH. The RS Government will continue promoting economic growth by instituting market reforms and sound fiscal policy. It will build on the success of earlier reforms, which have helped give the RS the highest economic growth rates, lowest unemployment, and most competitive economy in BiH. The RS Government is committed to maintaining the decentralized structure as established for BiH in the Dayton Accords, which is beneficial to economic growth. The ongoing economic crisis in the Federation of Bosnia and Herzegovina (“Federation”), shows what could befall the RS if power were to be centralized in Sarajevo.

3. The Office of the High Representative in Bosnia and Herzegovina (“OHR”), through its policies, actions, and very presence, retards economic growth, market reform, and foreign investment throughout BiH. The OHR has caused considerable economic loss and damages to BiH, its Entities and citizens. A most recent example is the debacle caused by the High Representative’s decisions regarding the sale of electricity to Brčko, which has caused significant economic damage to Brčko and has led the European Commission to condemn the decisions as violating the Energy Community Treaty and Stabilization and Association Agreement and other EU standards. The RS Government will work to reverse the OHR’s economically destructive actions, as the National Assembly did this summer by voting to repeal the High Representative’s “temporary” freeze order on RS’s state property decreed on March 21, 2005.¹

B. Restoring Constitutional and Democratic Government

4. The RS Government will continue to work for the long-overdue closure of OHR in order to restore constitutional and democratic government to BiH. The peremptory powers asserted by the High Representative, including the authority to enact laws, amend constitutions, and punish public officials by unilateral decree, have no legal basis in the Dayton Accords, Security

¹ See Decision Enacting the Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska, March 21, 2005.

Council resolutions, or anywhere else. The High Representative has continued to use peremptory powers and intimidation in violation of BiH and international law. Even worse, the High Representative has to date successfully blocked all judicial review of his actions. The OHR's main priority is indefinitely prolonging its dominion over BiH, and the Peace Implementation Council ("PIC") Steering Board's conditions for supporting OHR's closure, unfortunately, are ideal for this purpose.

5. The RS Government will also seek OHR's closure because it is required for progress in accession to both the European Union ("EU"). The EU has repeatedly stated that even application for EU membership cannot occur until after OHR closure. The OHR remains the major obstacle to fulfillment of the Copenhagen Criteria. Its actions are contrary to applicable human and political rights treaties and economic treaties. The RS will oppose any effort to replace OHR with a new international official who asserts decree powers similar to those claimed by the High Representative. Such an official would similarly block progress toward European integration and could not be established as a matter of law without the consent of BiH and its Entities.

6. The RS Government has a legal duty to observe the BiH and RS Constitutions and domestic and international law. These obligations require the RS Government not to recognize or enforce OHR decisions that conflict with applicable law. The RS Government is acting to restore judicial and prosecutorial independence and the judicial structure, which have all been badly damaged by the OHR. Practices such as the OHR consulting with Constitutional Court justices on active cases and reviewing draft Court decisions before they are finalized, as publically acknowledged, are among the many unlawful actions of the OHR that must be addressed. The RS Government will also work to halt OHR's human rights abuses and seek justice for its victims. In addition, the RS Government plans to seek a referendum soliciting voters' views about the High Representative's imposition of laws extending the mandate of foreign judges and prosecutors in BiH by decree.

C. European Integration

7. The RS Government supports BiH's accession to the EU and is committed to the success of BiH's EU integration. It will be vigilant, however, to ensure that the accession process is not misused by local and international parties as a pretext for making drastic constitutional changes unnecessary for accession and detrimental to the RS and BiH as a whole. The accession process should be a conventional one in which talks on any necessary constitutional changes come much later than the present pre-application stage. Certainly, for reasons explained in this report, such talks are impossible until OHR leaves BiH, with the sole exception of an amendment to comply with the European Human Rights' decision in *Sejdić and Finci v. BiH* ("*Finci*"). During the time that OHR remains in BiH, the RS Government will continue to advance BiH's EU integration, including by working for the implementation of the EU-BiH Stabilization and Association Agreement ("SAA") and for BiH's fulfillment of the EU's Copenhagen Criteria for membership.

8. Any constitutional amendments that may eventually be required for EU membership must be the result of a transparent and lawful process and a domestic consensus achieved without foreign interference. Moreover, any such constitutional changes must retain the fundamental protections for Entity autonomy and the equality of BiH's Constituent Peoples guaranteed by the BiH Constitution (Annex 4 of the Dayton Accords).

9. In the coming months and years, the RS Government will work to forge a domestic consensus for measures to improve BiH's governance while preserving the Dayton framework. The RS Government believes BiH's democratically elected leaders, if given political space, can work successfully together to build this consensus.

10. As summarized above and outlined in greater detail in this Fourth Report to the UN Security Council, the RS Government will work diligently to achieve its priorities of strong economic growth, the restoration of constitutional and democratic government to BiH, and European integration consistent with the Dayton framework.

II. Economic Growth is the RS Government's primary goal and should be the focus of the international community's relations with BiH and its Entities.

11. The RS Government's central objective is to ensure the conditions for strong and sustained growth in the RS economy. In the past several years, the RS Government has enacted a host of market reforms designed to encourage such growth. These reforms have succeeded in giving the RS the highest growth rates in BiH, cutting unemployment, and raising wages. It is the decentralized structure of the Dayton Constitution that gives the RS the freedom to enact reforms such as these. The dangers of centralizing power in Sarajevo are underlined by the Federation's failure to reform and its ongoing economic crisis. The OHR's presence in BiH and its interventions in governance are inhibiting growth throughout BiH. The RS Government has taken steps to respond to such interventions, including by enacting legislation lifting the OHR's economically crippling freeze on state property. Promoting economic growth is the central focus of the RS government. In its relations with BiH, the international community's focus should be the same.

A. The RS Government has vigorously pursued market reforms.

12. The RS Government has moved resolutely in recent years to enact market-oriented economic reforms, including the privatization of state-owned enterprises. It has worked cooperatively with international financial and regulatory bodies to improve RS laws and regulations in order to increase the RS's competitiveness, boost private enterprise, and attract foreign direct investment.

13. The RS Government was the first in the Balkans to employ the Regulatory Guillotine process to rapidly review regulations and eliminate those that are unnecessary.² Since launching the Regulatory Guillotine process in 2007, the RS Government has already eliminated 25% of the regulations affecting the launch of business operations and more than half of inspection procedures.³ The time required for company registration in the RS has been reduced from more than 30 days to just a week.⁴ By comparison, according to the World Bank and IMF's 2010 Doing Business study, launching a business in Sarajevo (in the Federation) still takes 60 days.

² Republika Srpska Investment-Development Bank, *Positive Attitude Towards FDI*, available at www.irbrs.net/Investiranje.aspx?id=10&par=1&lang=eng.

³ *Id.*

⁴ *Id.*

14. The Government has also eased or eliminated other procedures that raise the cost of doing business.⁵ The number of inspection measures has been cut by 43%.⁶ The Regulatory Guillotine reforms have already saved businesses millions of Euros.⁷ In addition to saving time and money, reducing business registration and licensing requirements minimizes opportunities for corruption.

15. In addition to eliminating unnecessary regulations, the RS Government has simplified tax regulations and bankruptcy proceedings. With the help of USAID, Banja Luka, as a pilot city, has instituted a new electronic system for construction permitting under which permits will be issued in fewer than 60 days.⁸ Moreover, the new Law on Business Companies, which took effect on January 1, 2010, is expected save businesses millions of Euros annually by simplifying procedures.⁹ In addition, as the International Crisis Group (“ICG”) notes in a recent report, “Every RS ministry . . . tries to harmonise new regulations and laws with the EU *acquis*.”¹⁰

16. In order to liberalize its economy, the RS Government has also implemented a far-reaching privatization program. As of July 2010, the RS had privatized 713 companies, improving the competitiveness of the RS economy and raising funds for RS accounts. The privatization of RS Telecom and RS Oil alone raised €700 million.¹¹ The effect of privatization is shown in the growth of the RS’s GDP from KM 5,115.60 in 2005 to KM 8,489.30 in 2008.¹²

17. The RS Government is continuing to reform its legal framework in order to cut bureaucracy, simplify regulations, and otherwise improve the business climate. International experts have recognized the RS Government’s commitment to economic reform. For example, the International Monetary Fund, in its Request for Standby Arrangement for BiH last year, wrote, “In recent years, policies have been diverging between the two Entities, with the RS making steady progress on reforms and the Federation finding it difficult to mobilize action on needed reforms.”¹³ High Representative Inzko has also acknowledged the RS’s economic reforms. In his address to the Security Council in May, for example, the High Representative said:

The Federation has considerable difficulties to deal efficiently with the necessary IMF conditions, which may affect the Bosnia and

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ International Crisis Group, *Federation of Bosnia And Herzegovina – A Parallel Crisis*, Europe Report N°209, Sept. 28, 2010 (“ICG September 2010 Report”), p. 13.

¹¹ ICG September 2010 Report at n. 151.

¹² Database of Economic Indicators of the Republika Srpska, Main Economic Indicators, Comparative Review, available at www.irbrs.net/statistika.aspx?tab=2&god=2009&lang=eng (“Comparative Review of Economic Indicators”).

¹³ International Monetary Fund, Request for Stand-By Arrangement, Bosnia and Herzegovina, June 17, 2009, p. 4.

Herzegovina's fiscal sustainability in the medium- and long-term. In this regard, as far as IMF negotiations are concerned, the situation is much better in Republika Srpska.¹⁴

18. In an October 2009 proposal, the European Commission's staff wrote, "Due to a more ambitious privatisation and structural reform agenda, the fiscal space was larger in the Republika Srpska than in the Federation."¹⁵

19. In a report last year, the ICG wrote that "[t]here is some validity" to RS assertions "that certain state institutions do not function well."¹⁶ The ICG explained, "[T]he RS government is more efficient than the [Federation's], consumes a much smaller percentage of GDP and is implementing reforms more quickly. RS has also privatised many more state enterprises, an area where the FBiH lags."¹⁷ The ICG's Srečko Latal wrote last year that the RS has been proceeding with an aggressive privatization policy which has placed it in a much better position [than the Federation] when dealing with the current economic crisis."¹⁸

B. The RS Government's market reforms have given the RS the highest economic growth rates in BiH.

20. The RS's market reforms have fueled economic growth and pushed unemployment lower. From 2006 to 2009, the RS's per capita GDP grew 26.7% despite a small contraction in 2009 due to the global economic crisis. By comparison, during the same period the Federation's per capita GDP grew by 19.9% and the European Union's per capita GDP declined slightly.¹⁹ From 2006 to 2009, according to the International Labor Organization ("ILO"), unemployment in the RS dropped by just over seven percentage points.²⁰

21. This year, the RS economy appears to be resuming its growth. In the first half of 2010, the RS recorded a year-over-year industrial production growth rate of 7 percent.²¹ This is compared to a 1.3 percent rate in BiH as a whole and a negative 2.3 rate in Croatia.²² According to ILO figures, unemployment in the RS is now 5.5 percentage points lower than in the Federation.²³

¹⁴ Speech by High Representative Valentin Inzko To the UN Security Council, May 24, 2010.

¹⁵ Proposal for a Council Decision providing macro-financial assistance to Bosnia and Herzegovina, Oct. 29, 2009, SEC(2009) 1459, p. 4.

¹⁶ International Crisis Group, *Bosnia's Incomplete Transition: Between Dayton And Europe*, Europe Report N°198, 9 March 2009, p. 9.

¹⁷ *Id.*

¹⁸ Srečko Latal, *Bosnian Federal Government Loses Ground*, BalkanInsight.com, April 21, 2009.

¹⁹ Comparative Review of Economic Indicators.

²⁰ *Id.*

²¹ Republika Srpska Investment-Development Bank, *Economic Monitor*, Sept. 2010, p. 3.

²² *Id.*

²³ Comparative Review of Economic Indicators.

22. The RS Government's market reforms have also helped to boost wages in the RS. From 2006 to 2009, average wages in the RS jumped 51 percent.²⁴ Wages in the RS have historically been significantly lower than those in the much more urbanized Federation, and they still lagged by 13.4 percent in 2006. Since then, however, average wages in the RS have risen to rough parity with those in the Federation.

C. Decentralization benefits economic performance, particularly in countries with conflicting regional preferences.

23. Decentralized structures such as that of BiH improve economic performance. This is particularly the case in countries like BiH where policy preferences differ starkly between regions.

24. A 2009 study by the Swiss-based independent research institute BAK Basel Economics determined that decentralization benefits economic performance. The study, commissioned by the Assembly of European Regions ("AER"), a network of regions from 33 European countries, found that "decentralisation, amongst other factors, has a significantly positive influence both on the level and the dynamics of economic performance of countries and regions: The higher (ceteris paribus) the decentralisation indicator, the higher the economic performance."²⁵ As AER Secretary General Klaus Klipp said at the study's release, "Centralism hammers development of countries at the cost of its citizens."²⁶

25. The AER study emphasizes that decentralization is most beneficial in countries where policy preferences differ based on region. According to the study:

The demand for public goods can differ substantially between regions because the preferences of citizens are formed by regional traditions. . . . The bigger the differences in regional preferences within a country, the greater the potential benefits from decentralisation. By supporting decentralisation different preferences of the population can be better incorporated into policy. This helps to ensure that an individual's needs will be considered more adequately.²⁷

26. Thus, the need for a decentralized state structure is particularly acute in BiH, which has vast differences in policy preferences between citizens in the RS and the Federation.

²⁴ Comparative Review of Economic Indicators.

²⁵ *From Subsidiarity to Success: The Impact of Decentralisation on Economic Growth, Part 2: Decentralisation and Economic Performance* (May 2009) (researched and produced by BAK Basel Economics, commissioned and published by Assembly of European Regions), available at www.aer.eu/fileadmin/user_upload/PressComm/Publications/AER_Study_on_decentralisation/Studies/BAK-Part2-FINAL%2Bcover.pdf ("From Subsidiarity to Success"), p. 4.

²⁶ Valentina Pop, *Centralised states bad for economy, study shows*, EUObserver, May 18, 2009.

²⁷ *From Subsidiarity to Success*, p. 15 (citations omitted).

D. The economic crisis in the Federation demonstrates the dangers of centralizing power in Sarajevo.

27. The economic crisis in the Federation shows why efforts to centralize power in Sarajevo would not only violate the Dayton Accords but, if successful, would be disastrous for the RS economy. As the High Representative said in his most recent speech to the Security Council, in the Federation “a divided government has limped from crisis to crisis during the reporting period.”²⁸ As the ICG’s recent report says, “The Federation plunged into a financial crisis in 2008 from which it shows no sign of emerging.”²⁹ If BiH were to be centralized, the Federation, which has a population almost twice as large as that of the RS, would dominate. For a view of what a centralized BiH would look like, one need only look to the Federation’s broken political culture and exceptionally ineffectual government.

1. Unnecessary regulations inhibit investment and breed corruption.

28. The economy of the Federation is characterized by innumerable unnecessary barriers to investment. According to the World Bank and IMF’s 2010 Doing Business report, starting a business in Sarajevo takes 16 procedures and 60 days. Obtaining a construction permit takes 23 procedures and 264 days. Registering a property takes 7 procedures and 84 days. According to the ICG report, a regulatory reform consultant opined “that the Federation lags far behind RS, which overhauled regulations in 2006 and by 2008 had harmonised its legislation with the BiH constitution.”³⁰ In statement on May 24, 2010, the PIC Steering Board ambassadors admonished the Federation over “delays in implementation of structural measures agreed under the [IMF] Stand-By Arrangement.”³¹ In addition to raising costs for business, the Federation’s multiplicity of registration and licensing requirements breeds corruption. As the head of the European Bank for Reconstruction and Development in Sarajevo said in a recent interview: “Some 53 signatories are needed to get building permits in Sarajevo. It’s crazy. If only 10 per cent of those 53 officials are corrupt, that is already a big problem. This is not acceptable.”³² A local expert quoted in the ICG report says the corruption problem is worst in the Federation’s cantons “because there is the least control and judicial oversight.”³³

2. The Federation has failed to control its budget.

29. A central reason for the Federation’s financial crisis is its inability to control spending directed toward powerful interest groups. As the ICG writes, “The global recession hurt, but the real culprit is excessive spending, especially to fulfil 2006 election promises to interest groups, including veterans and persons with disabilities.”³⁴ Bankruptcy, the ICG says, “was averted in

²⁸ Speech by High Representative Valentin Inzko to the UN Security Council, May 24, 2010.

²⁹ ICG September 2010 Report, p. 16.

³⁰ *Id.*, p. 13.

³¹ Statement by the Peace Implementation Council Steering Board Ambassadors, May 24, 2010.

³² ICG September 2010 Report, n. 136.

³³ *Id.*, p. 18.

³⁴ *Id.*, p. 16.

2009 only after the IMF promised the state (BiH) €1.2 billion in budget support, but repayment must begin in 2012.”³⁵ Moreover Federation officials have continued to “delay key reforms and try to renegotiate conditions.”³⁶ In his May speech to the Security Council, the High Representative said, “The Federation has failed to complete the appointments to government and Judiciary functions and to make budget cuts required by the IMF in the face of determined opposition from members of war veterans’ organisations.”³⁷ The ICG concludes that governments in the Federation will soon “face the almost impossible mission of servicing the [Federation’s] growing debt without triggering massive public unrest.”³⁸ The Financial Times, similarly, wrote in October that in contrast to the RS, which “has met obligations to the International Monetary Fund . . . the Federation hovers on the brink of bankruptcy and has failed to make budget cuts, say IMF officials.”³⁹

3. The Federation has failed to privatize state-owned enterprises.

30. Again in contrast to the RS, the Federation has failed to privatize large state-owned companies. Plans in recent years for the Federation to privatize state-owned energy and telecommunications companies collapsed. As Srečko Latal of the ICG wrote last year, politicians in the Federation “for the past three years have completely halted the reform process and have allowed excessive public spending—ineffective social payments, including raising their salaries, has led their spending to run amok.”⁴⁰ The ICG wrote in its September report, “The Federation has no clear strategy when and how to privatise its strategic companies, nor how to develop its energy sector.”⁴¹

4. The business image of the RS already suffers from the Federation’s poor business environment.

31. The RS’s business-friendly environment is often overlooked because it is wrongly conflated with the totally different environment in the Federation. For example, the widely cited *Doing Business in Bosnia and Herzegovina* report published by the World Bank and IMF does not examine the environment for doing business in the RS or even BiH as a whole. Instead, the report is based on case scenarios of a fictional company in Sarajevo, the capital of the Federation.

32. The conditions affecting a business operating in the Federation are determined almost entirely by the laws, regulations, and practices of the Federation and its governmental units. The picture the report paints is a bleak one: BiH ranks 116th out of 183 economies in ease of doing

³⁵ *Id.*

³⁶ *Id.*

³⁷ Speech by High Representative Valentin Inzko to the UN Security Council, May 24, 2010.

³⁸ ICG September 2010 Report, p. 16.

³⁹ *Fear of Bosnia break-up hangs over poll*, FINANCIAL TIMES, 1 October 2010

⁴⁰ Srečko Latal, *Bosnian Federal Government Loses Ground*, BalkanInsight.com, April 21, 2009.

⁴¹ ICG September 2010 Report, p. 17-18.

business.⁴² The *Doing Business* studies of BiH, because they are based on case scenarios solely in the Federation, have virtually no relevance to the ease of doing business in the RS.

5. How can Sarajevo govern the RS if it is incapable of governing the Federation?

33. The Federation's political dysfunctionality and ongoing financial crisis serve as a warning of what a centralized BiH state would bring to the RS.

34. As Ian Bancroft, cofounder of TransConflict, wrote in October, "much of" the support for then-RS presidential candidate Milorad Dodik

derives from the steps taken to reform the Republika Srpska's economy, promote foreign investment and create employment opportunities. The same cannot be said about the Federation, which remains hamstrung by bloated bureaucracy, ineffective decision-making structures and poorly-controlled public spending (particularly to war veterans); leaving it lingering on the verge of bankruptcy for several years now. It is clear that persistent failures to reform the Federation have impeded efforts to strengthen state structures. Many in the Republika Srpska question why they should seek closer ties with what they perceive to be a failed part of the state.⁴³

35. At the end of its September report on the Federation, the ICG writes that all three of the Federation's largest parties "advocate a much stronger role for the BiH state, with clear supremacy over the entities. Yet, none have articulated how they would use this supremacy, notably over the RS. Nor have they used their dominant position in the Federation to enact reforms."⁴⁴ The report concludes, "Only by endorsing compromise politics, offering full protection to Croats, ignoring RS provocations *and accepting the reality that the country's future is as a decentralised state* can Bosnia's leaders revitalise first the Federation and then Bosnia itself."⁴⁵

E. Actions of the OHR are blocking BiH economic growth, market-oriented measures and foreign investment in both Entities of BiH.

1. The OHR's very presence discourages economic development in BiH.

36. Some 15 years after the end of the war in BiH, the OHR's continued presence cripples BiH's ability to attract foreign investment by stigmatizing it as an international protectorate. When foreign investors look at BiH, they see not a stable, sovereign and democratic state

⁴² In the only category of the study not dominated by the laws, regulations and practices of the Federation and its governmental units—trading across borders—BiH ranks a comparatively respectable 63rd in the world.

⁴³ TransConflict, *Bosnia must "cease being a protectorate"*, Oct. 2010.

⁴⁴ ICG September 2010 Report, p. 23.

⁴⁵ *Id.* (emphasis added).

governed according to its constitution and laws, but a protectorate overseen by a foreigner who acts as if his word is law. Though BiH is not unstable, dangerous, or lawless, the presence in BiH of a High Representative who claims to wield such extraordinary authority signals to the world that it must be.

37. In order to justify its existence and preserve the OHR's power, OHR officials frequently exaggerate and even cause BiH's problems. OHR officials often make public and derogatory statements about BiH and its public officials. For example, in a speech in December, the Principal Deputy High Representative accused BiH's duly-elected officials of "keeping Bosnia and Herzegovina in the economic neighborhood of Uganda and Cambodia."⁴⁶ While BiH—particularly the Federation—has room for improvement as a business location, the OHR's exaggerated rhetoric unnecessarily scares away foreign investment and inhibits economic progress in BiH.

2. The unpredictability caused by OHR intervention inhibits economic progress.

38. The OHR inhibits economic development in BiH by adding unpredictability to the economy. In a normal democratic country, a business considering whether to grow or invest must consider the legal and regulatory landscape and how the country's constitutionally established authorities might change it. In BiH, in addition to these factors, a business must consider whether the OHR, an extra-constitutional overseer, will suddenly decree changes to laws and regulations or summarily remove and ban from office duly elected or appointed officials. The High Representative has often engaged in both of these practices. Uncertainty is the enemy of economic development, and the OHR is an ongoing source of considerable uncertainty in BiH.

3. Unlawful and anti-competitive OHR decrees needlessly raised electricity prices and breached international agreements.

39. A recent example of the economic toll of the OHR's interference is its unlawful and disastrous intervention into the supply of electricity to Brčko, a self-governing district held in condominium by the RS and the Federation. On September 18, 2009, the High Representative unilaterally issued a series of decrees that have directly caused a sharp increase in electricity prices in the Brčko District. The decrees brought about this rate hike by mandating that a low-cost electricity producer based in the RS and a high-cost electricity producer based in the Federation each supply 50% of Brčko's electricity needs. Before the High Representative's September 2009 decrees, Brčko had naturally purchased all of its power from the low-cost producer in the open market. In order to partially offset the OHR-imposed price increase caused by mandating purchase of electricity from the Federation, the Principal Deputy High Representative and Brčko Supervisor issued an order using Brčko funds to subsidize electricity purchases.

⁴⁶ Speech by Principal Deputy High Representative Raffi Gregorian at the Presentation of the Global Competitiveness Report 2009-2010, Dec. 9, 2009.

40. The series of decrees imposed a gratuitous hardship on the people of Brčko, depleted public funds Brčko could have used for other purposes, and took business away from the low-cost electricity producer. Even with the waste of public funds to offset a needless price increase, the subsidized price was still significantly higher than Brčko citizens would have paid if the High Representative had not interfered. In addition, the decrees violate the OHR's 2001 agreement with the Entities and Brčko on the district's electricity supply—the agreement the OHR itself had signed—and vastly exceed the High Representative's Dayton authority. Moreover, as the European Commission informed the Principal Deputy High Representative by letter, and as explained in Section III(B)(4) below, the decrees' anti-competitive provisions cause BiH to breach its obligations under the SAA, the Interim Agreement on Trade, and the Energy Community Treaty.

41. The decrees' arbitrariness, anti-competitive principles, inconsistency with international agreements, and fiscal irresponsibility undermined market liberalization efforts and BiH's standing as a place to do business. The High Representative's harmful and unlawful interference in the Brčko electricity market exemplifies the ways in which the OHR continues to damage BiH's economy.

F. The RS Government's lifting of the OHR-decreed freeze on RS state property will accelerate economic growth.

42. Another destructive OHR intervention in BiH's economy has been a series of decrees in which the High Representative has kept state property frozen in government hands for the past five years. On September 14, 2010, the RS National Assembly ("RSNA") addressed this problem by approving a new Law on the Status of State Property which is under the Prohibition of Disposal. The new law lifted the economically damaging prohibition on the disposal of state property of the RS, which the High Representative imposed by decree in 2005 as a "temporary" measure that was to last no more than a year. The new law also ensures that the institutions of BiH, including the Ministry of Defense, have the use of property they need to perform their functions for as long as needed.

1. The High Representative decreed laws freezing state property.

43. During the tenure of High Representative Lord Paddy Ashdown, the OHR sought to dramatically expand by decree the competencies of the state government and established new state-level institutions. To support this expansion, on September 24, 2004, the PIC Steering Board chaired by the High Representative "called on all levels of authority in BiH to carry out the necessary steps to ensure that all the institutions of BiH—at the state level—have the premises they need"⁴⁷ On March 21, 2005, Lord Ashdown issued an edict imposing on the RS the "Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska," freezing the disposal of such property. Similar laws were also imposed on the Federation and BiH. Lord Ashdown contended that the temporary prohibition was necessary because state property of the Federation and the RS needed by the newly-created BiH institutions to function might otherwise be disposed of. In 2008, the High Representative, by decree, removed the

⁴⁷ Communiqué by the PIC Steering Board, Sept. 24, 2004.

expiration dates from the freeze laws, requiring resolution of the state property issue in order for the freezes to be lifted.

2. Bosniak parties abrogated their agreement to PIC-proposed “functional and territorial compromise.”

44. In October 2008, the PIC Steering Board urged a “functional and territorial compromise” on state property that “sees the State-level institutions owning those properties needed for them to ‘functionally’ exercise their constitutional competencies, while other levels of government would own the remaining State Property based on ‘territorial’ principles.”⁴⁸ The Steering Board made clear that the only property required to be allocated to BiH was that property needed for the functional exercise of competencies of the BiH institutions. Based on the territoriality principle, which had been the basis for state property ownership since the Dayton Accords, all other property would remain under Entity ownership.

45. In a November 2008 meeting in Prud, the leaders of BiH’s main Serb, Bosniak, and Croat parties agreed to resolve the state property issue using the “functional and territorial” criteria established by the PIC Steering Board. They agreed to allocate to BiH the property needed for running state institutions and leave the remaining property with the Entities and municipalities. The PIC and UN Security Council warmly endorsed this “Prud Agreement,” and High Representative Lajčák supported political leaders’ efforts to implement the agreement.

46. However, in an abrupt change of position, the Bosniak political leader Sulejman Tihić asserted that all state property throughout BiH must be registered as the property of BiH. Only then could state property be reallocated to the Entities (or municipalities). The new Tihić position conflicts with the applicable law and practice. The Dayton Accords, including the BiH Constitution, the practice of the Entities and relevant government statutes, decrees and judicial decisions all establish that state property is vested in the Entities, not BiH, unless an agreed transfer is effected. The High Representative’s actions have also recognized that state property belongs to the Entities. For example, a law decreed by the High Representative in 1998, approved by the Parliament in 1999, and upheld by the Constitutional Court in 2007 “expressly recognizes the right of the Entities to privatize non-privately owned enterprises and banks located on their territories.”⁴⁹ Additionally, the titles and terms of the freeze order laws, which address “State Property of the Federation” and “State Property of the Republika Srpska” (and the recognition that separate laws were needed for state property of each Entity), show the High Representative was aware that state property is vested in the Entities.

47. The RS Government has continued in good faith to seek agreement on the apportionment of state property. Unfortunately, the RS Government’s desire for resolution has not been shared among the main Bosniak parties. This is because a resolution on state property is a remaining requirement established by the PIC for closure of the OHR. The main Bosniak parties do not want such an agreement because they want the OHR to remain in place. This problem has been recognized by third-party experts. For example, in a recent report on BiH, the ICG stated:

⁴⁸ Statement by the Ambassadors of the Peace Implementation Council’s Steering Board, Oct. 30, 2008.

⁴⁹ Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, Nos. 14/98 and 12/99).

“Bosniak parties will not agree to a state property proposal until RS agrees to constitutional reform [R]esolution of the state property issue is elusive not because the problem is inherently hard but because the PIC has linked it to Bosnia’s most controversial issue, the fate of the OHR.”⁵⁰

3. The new law lifts the costly freeze and ensures BiH property necessary to fulfill its functions.

48. This stance of the major Bosniak parties ensures that, under the freeze laws imposed by the High Representative, the economically debilitating prohibitions on disposal of state property would remain in effect indefinitely. This is why the RSNA determined to adopt the only solution now available: lifting the freeze by passing a new law that replaces the Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska.

49. The new law approved by the RSNA reflects the territorial and functional principles espoused by the PIC. It provides that all state property in the RS under prohibition of disposal will be officially registered as property of the RS, documenting in the property register the long-established law and practice in BiH. The new law also lifts the High Representative’s 2005 freeze on disposing of RS state property.

50. Public properties of the RS Government cannot continue to remain frozen indefinitely; instead such property should be used in an economically efficient manner, particularly now, in the midst of a global economic crisis. By permitting the sale and lease of government-owned properties, the new law will help the RS and its subdivisions to improve their fiscal condition and make land available for the flowering of private enterprise.

51. At the same time, the new law directs the RS Government to sign an agreement with the BiH Council of Ministers transferring use rights for any property necessary for BiH institutions, including the Ministry of Defense, to fulfill their functions. The new law specifies that the property that is transferred to BiH institutions will be transferred without payment and for as long as the property is needed. The new law also provides that the BiH institutions using the properties will have the right to adapt these properties to suit their use.

52. The new law is a responsible and forward-looking resolution of the status of state property in the RS. By lifting what was supposed to have been a temporary freeze on disposal of state property, it removes a costly and unnecessary obstacle to economic growth.

III. Closure of the OHR Is Essential For European Integration.

53. The High Representative’s departure from BiH is required for progress toward BiH’s accession to the EU. The presence in BiH of any other international official who claims powers similar to those asserted by the High Representative would similarly block European integration for BiH.

⁵⁰ International Crisis Group, Bosnia’s Dual Crisis, Europe Briefing N°57, Nov. 12, 2009 (“ICG November 2009 Report”), p. 10.

A. Progress toward EU membership requires the departure of the OHR.

1. The EU will not consider a BiH application for membership until the OHR's closure.

54. The European Union has repeatedly stated that it will not even consider a membership application from BiH until the OHR closes. In May, for example, the United Kingdom's ambassador to UN, Mark Lyall Grant, told the Security Council, "The European Union has made clear that a membership application from Bosnia and Herzegovina cannot be considered while the Office of the High Representative remains in place."⁵¹ On September 29, 2009, a representative of the EU Presidency testified to the US Helsinki Commission that "[a]s long as OHR remains in place, a Bosnian EU membership application cannot be considered."⁵² Thus, until the OHR closes, BiH cannot even begin the EU application process.

55. The application is the first in a long and time-consuming series of steps that a potential candidate and EU institutions must take before the potential launch of membership negotiations. These include, for example: the European Commission's presentment to the applicant of a legislative questionnaire hundreds of pages long; the applicant's responses to this questionnaire; the Commission's preparation of an opinion on the application; the Commission's recommendation for or against granting the applicant candidate status; the European Council's decision on whether to grant such status; the Commission's recommendation for beginning membership negotiations, and the European Council's decision setting a start date for negotiations. All of these steps must take place before the membership negotiations even begin. Every month that the OHR remains in operation is another month in which BiH and the EU are prevented from working toward fulfillment of these demanding steps—another month wasted.

2. OHR activities prevent BiH fulfillment of the Copenhagen Criteria on both democracy and human/political rights grounds.

56. The EU's refusal to consider an application from BiH as long as the OHR is in place is warranted because the OHR prevents BiH from fulfilling the Copenhagen Criteria for membership. Throughout the EU accession process, the European Commission examines the extent to which the country seeking membership fulfills the Copenhagen Criteria. As summarized by the German Foreign Office, the Copenhagen Criteria

require that candidate countries have:

- stable institutions to guarantee democracy, the rule of law, human rights and respect for and protection of minorities (**political criterion**);

⁵¹ 6319th Meeting of the UN Security Council, S/PV.6319 (May 24, 2010), p. 18.

⁵² Address of Bjorn Lyrvall, Director General for Political Affairs, Ministry for Foreign Affairs of Sweden/Presidency of the EU to the U.S. Helsinki Commission, Sept. 29, 2009, at 8.

- a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU's internal market (**economic criterion**);
- the ability to take on all the obligations of membership, i.e. the entire body of EU law and policy known as the *acquis communautaire*, and adherence to the aims of political, economic and monetary union (**acquis criterion**).

At the Luxembourg European Council in December 1997, it was decided that compliance with the political criterion agreed in Copenhagen was a prerequisite for the opening of any accession negotiations. By contrast, the economic criterion and the ability to fulfil all the obligations of membership (*acquis criterion*) were to be assessed in a “forward-looking, dynamic way.”⁵³

57. The actions of the OHR clearly prevent BiH from fulfilling the political criterion. BiH does have stable democratic institutions as guaranteed by the Dayton Constitution. Unfortunately, BiH will not be a true democracy—and cannot say it has stable institutions guaranteeing democracy—as long as the High Representative, an unelected foreigner, asserts the power to enact and repeal laws by decree.

58. Similarly, the OHR’s actions prevent BiH from being able to guarantee the rule of law or human rights. As explained in section IV of this report, the High Representative has issued hundreds of decrees summarily removing public officials and banning them from government employment. The individuals given these “civil death” sentences are given no notice, no evidence, no hearing, and no opportunity to appeal their punishments. These summary punishments flagrantly violate a number of provisions of the European Convention on Human Rights (“ECHR”), including the right to “a fair and public hearing . . . by an independent and impartial tribunal established by law.”⁵⁴

59. In 2006, the BiH Constitutional Court unanimously held that the absence of a legal remedy to challenge the High Representative’s decision violated the ECHR.⁵⁵ But in direct contempt of the rule of law and human rights, the High Representative issued a new order nullifying the Constitutional Court’s decision and further decreeing: “[A]ny proceeding instituted before any court in [BiH], which challenges or takes any issue in any way whatsoever with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent.”⁵⁶ The order also provided that “no liability is

⁵³ Federal Foreign Office of Germany, *The Copenhagen Criteria*, available at www.auswaertiges-amt.de/diplo/en/Europa/Erweiterung/KopenhagenerKriterien.html.

⁵⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. TS No. 5, 213 UNTS 221 (“European Convention on Human Rights”), art. 6.

⁵⁵ Bilbija, AP-953-05 (BiH Const. Ct. 8 July 2006).

⁵⁶ Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (Mar. 23, 2007), art. 3.

capable of being incurred on the part of the Institutions of [BiH], and/or any of its subdivisions and/or any other authority in [BiH], in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decisions of the High Representative made pursuant to his or her international mandate *or at all*.”⁵⁷ Thus, in addition to forbidding review of his decisions, the High Representative banned victims of his human rights violations from obtaining any kind of remedy. In the same order, the High Representative even went so far as to threaten to remove and ban any official who took steps toward establishing a mechanism to review his decisions.⁵⁸

3. OHR orders compel BiH to violate its *human rights* treaty obligations, including provisions of the SAA.

60. By complying with decrees of the High Representative, BiH violates a number of treaties to which it is a party. As agreed in the Dayton Accords and the BiH Constitution, BiH has entered into 16 human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols and the International Covenant on Civil and Political Rights.⁵⁹ Among the rights to which BiH is committed by virtue of the Dayton Accords and other treaties are the right to a fair hearing, the right to an effective remedy, and no punishment without law.⁶⁰ When the High Representative summarily decrees that an individual will be removed and banned from public employment, BiH’s implementation of the order directly violates these fundamental rights.

61. When BiH implements such orders, it also violates the Stabilization and Association Agreement it signed in 2008 with the European Communities and its Member States. The SAA provides at Title I, Article 2:

Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter

⁵⁷ *Id.*

⁵⁸ As former OHR official Matthew Parish observes in a recent article:

Article 2 [of the order] reads: Any step taken by any institution or authority in Bosnia and Herzegovina in order to establish any domestic mechanism to review the Decisions of the High Representative issued pursuant to his international mandate shall be considered by the High Representative as an attempt to undermine the implementation of the civilian aspects of the General Framework Agreement for Peace in Bosnia and Herzegovina and shall be treated in itself as conduct undermining such implementation.” (Emphasis added.) This language was well known to be associated with dismissals of officials from public office.

Matthew Parish, *An Essay on the Accountability Of International Organizations*, INT’L ORG. L. REV., Vol. 7, No. 2 (2010), n. 158.

⁵⁹ See BiH Constitution, Art. II.2 and Ann. 1; General Framework Agreement, Ann. 4 and Agreement on Human Rights, General Framework Agreement, Annex 6.

⁶⁰ Other rights guaranteed by these treaties and often violated by the implementation of OHR removal orders include: freedom of expression; freedom of assembly and association; the right to free elections; protection of property; and the right to take part in public affairs.

of Paris for a New Europe, respect for principles of international law, including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement. (emphasis added)

62. By implementing—under coercion—the High Representative’s decrees to summarily remove and ban officials from public employment, BiH violates several of its obligations set forth in the SAA, including respect for democratic principles, human rights as defined in the listed instruments, principles of international law, and the rule of law.

4. OHR actions force BiH to violate *economic* treaty obligations, including provisions of the SAA.

63. Orders of the High Representative also compel BiH to breach economic treaties. For example, the High Representative last year issued a series of anticompetitive decrees that, in addition to sharply increasing electricity prices in Brčko District, also violate BiH’s obligations under several treaties to which it is a party. On September 18, 2009, the High Representative handed down edicts purporting to amend laws of BiH, the RS, and the Federation with respect to electricity supply and distribution in Brčko District. The decrees have imposed on the citizens of Brčko a large—and wholly unnecessary—increase in electricity rates. In addition, the edicts violate the OHR’s 2001 agreement with the Entities and Brčko on the district’s electricity supply, vastly exceed the High Representative’s lawful authority, and cause BiH to breach its obligations under international agreements.

64. Under the 2001 agreement, Brčko had the freedom to choose its electricity supplier from among the RS, the Federation, or suppliers abroad. As long as Brčko had the freedom to choose its supplier, it naturally chose the lowest cost supplier, which has long been the RS generating company, Elektroprivreda Republika Srpska (“EPRS”). Each year prior to 2010, EPRS and Brčko have negotiated a price for the electricity to be sold and transmitted to Brčko. For almost a decade, this arrangement worked reliably and without significant problems.

65. Then, on September 18, 2009, the High Representative inexplicably scuttled this arrangement and dictated that beginning in 2010 the Brčko market would be served 50% by EPRS and 50% by EPBiH, the main generating company in the Federation. The effect of this anticompetitive dictate is to reserve one-half of the Brčko market to EPBiH even though it charges significantly higher rates. On June 20, 2010, to partially offset the OHR-imposed price increase, the then-Principal Deputy High Representative and Brčko Supervisor, Raffi Gregorian, issued a decree subsidizing electricity for Brčko customers using funds controlled by Brčko District.

66. The OHR’s decrees have stunted Brčko’s economy and imposed a hardship on Brčko citizens by sharply raising electricity costs. In addition, the decrees deprive EPRS of sales of electricity it should be entitled to make as the low-cost supplier. They also violate the 2001

agreement on Brčko's electricity supply, which establishes Brčko's "freedom to choose the electric energy supplier either from BiH, or foreign supplier(s), or them combined."⁶¹ The decrees, moreover, are unlawful because the High Representative lacks any authority under the Dayton Accords to enact laws by decree (discussed in Section IV(C) *infra*).

67. What's more, as the European Commission informed the Principal Deputy High Representative and Brčko Supervisor, Raffi Gregorian, the decrees put BiH in violation of several international agreements to which it is a party. The 50-50 division of the Brčko electricity market between a high-cost supplier and a low-cost supplier is plainly anti-competitive and inconsistent with the SAA⁶² and the Interim Agreement on Trade,⁶³ to both of which BiH is a party.

68. The 50-50 division is also flatly inconsistent with Directive 2003/54/EC of the European Parliament and of the Council, and thereby violates the Energy Community Treaty, which requires BiH to implement that Directive. Mandating that two companies equally share Brčko's electricity supply and locking out all other companies is contrary the Directive's command that Member States "shall not discriminate between [electricity] undertakings as regards either rights or obligations."⁶⁴ The Directive also requires that when Member States impose "public service obligations" on electricity undertakings, these obligations must "guarantee equality of access for EU electricity companies to national consumers."⁶⁵ Limiting Brčko's electricity supply to two BiH companies breaches this provision because it completely bars EU electricity companies from the Brčko market. The Principal Deputy High Representative's June 30, 2010 subsidy partially offsetting the OHR-imposed price increase also violates the Interim Agreement on Trade⁶⁶ as well as the Energy Community Treaty.⁶⁷

69. In a July 16, 2010 letter to the Principal Deputy High Representative, a high European Commission official criticized the September 2009 and June 2010 decrees as inconsistent with international agreements and as undermining the Commission's market liberalization efforts in BiH. The official wrote:

⁶¹ Agreement on Implementation of the Entity Obligations from the Final Arbitral Tribunal Award on Brčko with respect to Electricity Supply, Sept. 25, 2001, art. 4.

⁶² Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and Bosnia and Herzegovina, of the Other Part ("Stabilisation and Association Agreement"), Art. 41 (prohibiting discrimination in the procurement of goods in favor of state monopolies), and Art. 71.1 (prohibiting practices between undertakings that prevent or distort competition).

⁶³ Interim Agreement on Trade and Trade-Related Matters between the European Community, of the One Part, and Bosnia and Herzegovina, of the Other Part ("Interim Agreement on Trade"), Art. 26 and Art 36.1 (same prohibitions as Art. 41 and Art. 71.1 of the Stabilisation and Association Agreement).

⁶⁴ Directive 2003/54/EC of the European Parliament and of the Council, art. 3, para. 1.

⁶⁵ *Id.*, para. 2.

⁶⁶ Interim Agreement on Trade, Art. 36.1 (prohibiting state aid that distorts competition).

⁶⁷ Treaty Establishing the Energy Community ("Energy Community Treaty"), Art. 18 (prohibiting public aid that distorts competition).

The 30 June 2010 order together with the 18 September 2009 Decisions of the OHR [go] against the objectives of the Energy Community Treaty with regard to market liberalisation and competitive market conditions.

Although the Energy Community Treaty requires full opening of the energy market only after 2014, the European Commission has been working with the competent authorities in the country since the entry into force of the Energy Community Treaty (2006) to change the necessary legislation in order to meet the objective of market liberalisation.⁶⁸

70. The European Commission official also observed, “The Supervisory order of 30 June 2010 is in breach of the Stabilisation and Association Agreement (SAA) and the related Interim Agreement on trade, which the European Union concluded with BiH in 2008.”⁶⁹

71. Thus, instead of helping BiH fulfill its international obligations and observe EU standards, the OHR is actually compelling BiH to flout them.

5. Support for the OHR’s use of peremptory powers by the EU and EU members is inconsistent with their obligations under the SAA and other treaties.

72. As members of the PIC Steering Board, the European Commission, the EU Presidency, and four EU members have endorsed the High Representative’s use of peremptory powers. By continuing to support the High Representative’s use of these self-claimed, extraordinary powers, these PIC Steering Board members are acting inconsistently with their economic and human rights obligations as parties to the SAA and other treaties.

73. The OHR, as a defendant before a U.S. federal court, has recently stated that it is an organ of the foreign states that make up the PIC, and as such it constitutes an instrumentality of each of those states.⁷⁰ In addition, the OHR asserted before the court that the High Representative, when acting in his official capacity, is acting as an employee of the foreign states.⁷¹ If, as the OHR claims, it is an organ or instrumentality of these foreign states, its actions and the actions of the High Representative are attributable to such states.

74. The EU has a legal obligation not to support the High Representative’s use of peremptory powers; failure to meet this obligation undermines its stated objectives of furthering the EU accession process. For as long as the High Representative continues to exercise such powers — indeed continues to exist — EU accession will be obstructed.

⁶⁸ Letter from European Commission to Raffi Gregorian, Principal Deputy High Representative and Brčko Supervisor, July 16, 2010.

⁶⁹ *Id.*

⁷⁰ Specially Appearing Defendants’ Motion to Dismiss, *Anthony Sarkis v. Miroslav Lajcak*, *Office of the High Representative*, U.S. District Court for the Northern District of California, 31 October 2008, p. 11.

⁷¹ *Id.* at p. 14.

B. Use of any “substitute” form of peremptory powers by a so-called “reinforced” EU mission would similarly block EU accession.

75. Some voices in the international community are pushing for the OHR’s departure from BiH to be followed by the introduction of a new EU or other international official who would assert powers similar to those asserted by the OHR. The presence of an official with such powers would prevent progress toward EU accession for the same reasons as does the presence of the OHR. Just like the High Representative, any new foreign official with executive powers would prevent BiH fulfillment of the Copenhagen Criteria and cause BiH to violate its international obligations.

C. Solving defense property issues in BiH also requires closure of the OHR.

76. The RS Government has agreed in internal negotiations to make public properties in the RS requested by NATO and BiH Defense Ministry officials available for their use without payment and for as long as the properties are needed. This policy has also been approved by the RS National Assembly. The RS Government’s position is extremely forthcoming, especially since, from a special perspective, most of the military property requested by BiH/NATO is in the RS rather than in the Federation. The OHR’s continued intervention into BiH governance and foreign relations, however, is creating both a practical and legal barrier to BiH progress toward NATO membership.

77. As explained elsewhere in this report, the involvement by the High Representative in sensitive internal negotiations among political leaders of BiH impedes the practical consensus-building and decision-making that is essential for BiH to successfully progress toward membership in NATO.

78. But the barrier to NATO membership constituted by the OHR and the High Representative is much more fundamental. Even a glance at the North Atlantic Treaty will illustrate that membership of a state ruled by an unelected, foreign official, appointed by foreigners, is inconsistent with the obligations imposed upon a member state by the Treaty. The second sentence of the Treaty describes NATO’s members as follows: “They are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law.”⁷² So long as the High Representative and the OHR exist, ruling by decree and asserting immunity from all decisions of BiH courts and other BiH governing agencies, there can be no democracy, individual liberty or rule of law in BiH.

79. In addition, the North Atlantic Treaty requires that its members—sovereign states—be in a position to make decisions and commitments of resources to assist in strengthening the collective security of all the members. So long as the OHR exists, intervening in the foreign relations of BiH, the BiH government lacks the requisite sovereignty and authority to make such decisions and therefore is not qualified for NATO membership. The RS Government is committed to Euro-Atlantic integration, in a form that will not be harmful to Republika Srpska,

⁷² North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S., preamble (emphasis added).

its integrity and international personality, and that respects the public declaration conducted according to the Constitution and laws.

IV. Restoration of constitutional and democratic government in BiH requires closure of the OHR.

80. Beginning with the second High Representative, taking office in June 1997, appointees to this position vastly expanded their staffs, creating the “Office of High Representative,” an agency not authorized by the Dayton Accords. The OHR rapidly grew to around 800 officials, soon assuming the form of a parallel government, but one ruling by decree and without legal authority or regard to the BiH Constitution, international agreements, or the rule of law. Many senior members of this office have spent their entire careers there. Their influence has become immense, and their ability to intimidate citizens and legitimately elected and appointed BiH officials is enormous.

81. Though without valid legal authority, OHR officials and the High Representative have improperly used international peacekeeping and police forces to force compliance with their decrees. Even more corrosive of the rule of law, High Representatives have arbitrarily dismissed from government, political, and academic positions hundreds of people, barring them from political activities, and future government employment. In some cases their assets have been seized or frozen and they have been prohibited from leaving the country. These “civil death” sentences have been imposed without any legal process or right of appeal. Most are still in effect today. Other citizens have been subject to nonpublic intimidation. It is widely known that the OHR assembles dossiers on government officials, political leaders, and public figures through various intelligence activities. Threats to use such secretly collected information are often made privately to officials not sufficiently compliant with OHR directives, formal and informal.

A. The High Representative has misused international military forces to threaten and intimidate compliance with unlawful peremptory powers.

82. The OHR’s use of peremptory powers and intimidation has been reinforced by extensive misuse of the international “peacekeeping” forces to threaten and intimidate. Lord Ashdown observed: “the close relationship between the OHR and SFOR [the NATO peacekeeping force] under [General] John Sylvester and, later, his most able successors became the twin pillar on which my mandate was based.”⁷³ This “close cooperation” violates the Dayton Accords which provide a very limited and specific mandate for international military forces. The result has been serious injury to members of the civilian population of BiH which, not coincidentally, reinforces the ability of High Representatives to impose compliance with illegal and unauthorized decisions and orders.

83. A recent decision of the Court of Bosnia and Herzegovina in a claim against BiH filed by plaintiffs Starovlah & Starovlah, described one such incident:

On 28 March 2007, the plaintiffs filed the claim for damages against the respondent with the Court of BiH. The claim states that,

⁷³ PADDY ASHDOWN, *SWORDS AND PLOWSHARES* (2007), p. 228.

on 1 April 2004 around 01:10, the members of NATO forces (SFOR) used explosive to blow up the door of the Parish House of Serb Orthodox Church “Holly Mother of God” in Pale, where plaintiffs and Zekić family lived. Then, they busted into the apartment of the plaintiffs and used blunt objects, implements, kicks and punches to cause Jeremija Starovlah and Aleksandar Starovlah serious bodily injuries. The injuries left difficult and permanent consequences to their health. The third plaintiff Vitorka Starovlah suffered mental trauma which caused strong mental pain, because she was not allowed to help her son and husband while that was happening, and later she suffered fear for their lives, recovery, as well as concern how her son Aleksandar would continue his life with injuries he suffered. SFOR transported the injured plaintiffs by helicopter to the Clinical Center in Tuzla where they were administered urgent medical aid and later they continued treatment at the Military Medical Academy in Belgrade and in rehabilitation centers. Previously, on 16 November 2004, the plaintiffs addressed the command of the NATO forces in Sarajevo, with the claim for damages, but their claim was denied on 19 January 2005, with the explanation there were no grounds for damages because it was a military operation.⁷⁴

84. In another case, during a 2006 raid on the home of Dragomir Abazovic in the village of Basic Kula in the RS, EUFOR troops shot and killed Abazovic’s wife, Rada, and seriously wounded their 11-year-old son, Dragoljub. In December 2008, EUFOR denied the Abazovic family’s claim for compensation, claiming that EUFOR had acted according to its Security Council Mandate. EUFOR also denied the Abazovic family any right to appeal.

85. Such use of international military force is a violation of international law. The Dayton Accords set out very clearly the mandate of peacekeeping forces and the purposes for which military forces may be used, in Annex 1-A, entitled “Agreement on the Military Aspects of the Peace Settlement.” These purposes do not include domestic-police-type activities such as raiding homes to apprehend individuals suspected of crimes.

86. Nor do these purposes include enforcement of decrees and orders of the High Representative.⁷⁵ Military and civilian aspects of implementation of the peace settlement were to be kept quite separate. Dayton Accords Annex 10, for example, states in article II-8: “[T]he High Representative shall have no authority over the IFOR and shall not in any way interfere in the conduct of military operations or the IFOR chain of command.”

B. The High Representative continues to use peremptory powers and intimidation in violation of BiH and international law.

⁷⁴ Court of Bosnia and Herzegovina, *Claim Filed by Jeremije, Aleksandar and Vitorka Starovlah partially granted*, Oct. 1, 2010, available at www.sudbih.gov.ba/komponente/print_vijesti.php?id=1793&jezik=e

⁷⁵ See, for example, Dayton Accords Annex 1-A article VI 1-6.

87. For some thirteen years, the High Representative has been summarily removing officials in BiH from public office and banning them indefinitely from holding public employment. The High Representative has removed nearly 200 citizens of BiH, including democratically elected presidents, legislators and mayors, as well as judges, police officials, and public company executives. The High Representative has also taken actions that deny other rights to BiH citizens, such as blocking bank accounts and seizing travel documents, indefinitely.

88. Despite the grave injuries these actions inflict upon the individuals subject to the High Representative's sanctions, he allows them no notice of the specific charges against them, no access to the evidence against them, no right to confront those who accuse them (or even to know the identity of their accusers), no hearings, no opportunity to contest the allegations, and no opportunity for appeal. The High Representative's actions, lacking even the most rudimentary form of due process, manifestly violate the human rights of the individuals sanctioned by his orders. His actions are contrary to the Dayton Accords (including the BiH Constitution and the applicable Human Rights Agreements in Annex 6). The removals also violate the "General Principles" set forth in Article 2 of the SAA. The High Representative's actions are an affront to the principles of international law, the sovereignty of BiH and the rule of law. They are also enormously corrosive of domestic political institutions.

89. In addition to the High Representative's decrees punishing individuals, which are publicly announced, the High Representative and OHR also assert raw power in less transparent ways. The use of intimidation by the OHR is well-known and widely reported in BiH, but such informal threats and intimidation are deployed secretly. Occasionally, however, evidence becomes public.

90. In October 2009, OHR documents obtained by the Sarajevo-based newsmagazine *Global* showed that the OHR had been secretly investigating political and other local leaders on such issues as money laundering, corruption, organized crime, and terrorist connections.⁷⁶ The leaked OHR documents included a diagram of an alleged criminal network that included the names of most of BiH's top Bosniak leaders in government and other fields.⁷⁷ A note on the documents indicated that they were to be made public for the EU.⁷⁸ In an interview about the scandal, the High Representative confirmed the existence of a unit within the OHR that created these documents and that this unit shares documents. He announced initiation of an internal investigation but would not reply when asked whether the internal intelligence organization producing the reports in question would be shut down.⁷⁹

91. Not surprisingly, there is no evidence that an internal investigation was conducted; no results of an internal investigation have been released.

⁷⁶ *Teška zloupotreba pečata OHR-a (Heavy abuse of OHR's stamp)*, GLOBAL, 29 Oct. 2009.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Bosnian peace envoy apologizes for publication of OHR analyses on Muslim leaders*, BBC MONITORING translation of interview in DNEVNI AVAZ, 3 Nov. 2009.

92. The OHR has no legal authority to conduct an intelligence operation and certainly has no authority to provide libelous information secretly to foreign ambassadors. The conduct recently revealed is damaging to the reputations of BiH citizens and BiH itself, and the OHR should be held legally accountable for any harm unlawfully caused. These revelations raise serious concern with respect to privacy rights and OHR interference in the BiH judicial and prosecutorial institutions, illustrating the OHR's practice of intimidation behind the scenes to libel and slander of BiH officials.

93. High Representative Inzko, commenting on the scandal, said, "I have not ordered an investigation against any individual or organization outside of the OHR."⁸⁰ If this is the case, then it is evident that the OHR is operating outside the control of even the High Representative. The High Representative further said, "I think that my team has not produced any scandal."⁸¹ His comments highlight the broader scandal that the OHR claims to be completely unaccountable for its use of sweeping powers which violate BiH and international law.

C. The preemptory powers were never authorized by the Security Council, and their use is in clear violation of the Dayton Accords.

94. The High Representative is an official designated by the Dayton Accords, Annex 10, to carry out certain specifically identified responsibilities set out in Annex 10.⁸² Indicative of the source of his authority is the fact that the grant of immunity accorded him and his staff in Annex 10 is granted only by BiH and is applicable only to BiH institutions. No immunity is granted, for example, from general international legal obligations, and he is not an international organization. The OHR has no member states or organizations as do international organizations. He has a mandate granted by the parties to Annex 10, no other charter or document of organization. His immunity is not limitless even as to BiH institutions. It extends only to actions taken within the scope of his mandate. As a matter of international law, he is responsible to BiH, the RS, the Federation and the other parties to Annex 10 for proper performance of his duties.

95. The High Representative's actions and authority can only be measured against a reasonable and legally valid interpretation of the mandate in Annex 10, to which he has the serious legal and moral duty to strictly adhere.⁸³ Such interpretation must be guided by the canon that an agreement not be construed to give what is not explicitly given and the requirement of interpretation in good faith. In cases where a treaty delegates to an international official responsibilities touching upon domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.⁸⁴ Such a restrictive interpretation is not necessary, however, to conclude that Annex 10 does not give the High Representative the powers

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Agreement on Civilian Implementation of the Peace Settlement (Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina), art. II.

⁸³ *See, inter alia*, Vienna Convention on the Law of Treaties, Sections 26, 31, 32 and canons of treaty interpretation in general international law.

⁸⁴ *See* W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT'L L. 231 (1989).

he claims. Any good-faith reading of Annex 10 compels such a conclusion. The RS again invites all observers to read Annex 10, which is attached as an Annex to this report, in order to confirm the absence of the peremptory powers asserted by the High Representative.

96. Any actions by the High Representative outside his Annex 10 mandate are *ultra vires* and thus without any legal force or effect. Such actions are internationally wrongful acts, for which the High Representative bears legal responsibility.

1. There is no treaty authority for peremptory powers.

97. Annex 10 does not authorize the High Representative to exercise the so-called “Bonn Powers.” Even general knowledge of the circumstances surrounding the conclusion of the Dayton Accords would make it impossible to conclude that the intent of the parties was to grant to a single, foreign official the power to amend constitutions, violate constitutional provisions, enact legislation, create new state institutions, remove democratically elected officials, or violate the human rights guaranteed to BiH citizens.⁸⁵ Certainly the plain language of Annex 10 does not grant such power to the High Representative or members of his staff. That Annex, moreover, must be read consistently with the other provisions of the Dayton Accords, including Annex 4, the BiH Constitution. Annex 4 establishes a carefully structured system of government for BiH in which powers are allocated and balanced among various organs at national and regional levels in BiH so that democratic governance is assured and the rights of the Constituent Peoples and Entities are protected. The High Representative has no authority in Annex 10 to act in violation of Annex 4 or Annex 6.

98. Whether used by the High Representative or a European Union Special Representative, exercise of these peremptory powers is inconsistent with the Constitution and international legal commitments of BiH, inconsistent with the general standards of human and civil rights required of members of the European Union, and inconsistent with the most fundamental principles of the rule of law and international law. Their use has been called into question or condemned by many international political and legal experts.⁸⁶ For example, the Council of Europe stated:

[T]he Assembly considers it irreconcilable with democratic principles, that the High Representative should be able to take

⁸⁵ It must also be emphasized that while the High Representative has “final authority” of interpretation with respect to Annex 10, his authority is limited—it must be exercised in accordance with general international law, including the Vienna Convention on the Law of Treaties. See *inter alia* articles 31 and 32. His “interpretation” of Annex 10 obviously cannot be an excuse for actions of the High Representative that violate international law or exceed his mandate. Indeed, such actions are void or voidable and entail international responsibility.

⁸⁶ See, e.g., Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT’L L. 1 (2004); Steven R. Ratner, *Foreign Occupation and International Territorial Administration; the Challenges of Convergence*, EUR. J. INT’L L. (2005), Vol. 16 No. 4; GREGORY H. FOX, HUMANITARIAN OCCUPATION (Cambridge University Press 2008); BERNHARD KNOLL, THE LEGAL STATUS OF TERRITORIES SUBJECT TO ADMINISTRATION BY INTERNATIONAL ORGANIZATIONS (Cambridge University Press 2008); Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. INTERVENTION AND STATEBUILDING, Special Supp. 2007; Rebecca Everly, *Complex Public Power Regulation in Bosnia and Herzegovina After the Dayton Peace Agreement*, 5 ETHNOPOLITICS No. 1 (2006); Gerald Knaus and Felix Martin, *Travails of the European Raj*, 14 J. DEMOCRACY, No. 3 (2003); RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION (Oxford 2008); DECONSTRUCTING THE RECONSTRUCTION, Dina Francesca Haynes ed., Ashgate 2008).

enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse.⁸⁷

The Constitutional Court of BiH has also held that their use violates the Constitution.⁸⁸

2. There is no Security Council authority for peremptory powers.

99. The various resolutions of the Security Council having to do with BiH do not purport to assign peremptory powers to the High Representative. Indeed, it is unlikely that the High Representative would have any legal authority to accept such powers, as his authority is circumscribed by his Annex 10 mandate. United Nations practice is, of course, to appoint and authorize specifically designated U.N. officials or states to carry out tasks authorized by Security Council resolutions.⁸⁹ In contrast, the High Representative and his functions were created by the parties to Annex 10. Generally the Security Council acts through the Secretary General and his appointed special representatives.⁹⁰ The High Representative is not an appointed special representative of the Secretary General. Certainly a scope of authority as extensive as that claimed by the High Representative cannot be implied on the basis of any Security Council Resolution thus far issued.

D. The High Representative has blocked all judicial means of requiring accountability for his actions.

100. The High Representative has to date successfully blocked all judicial review of his actions. The High Representative's orders routinely provide that they are to have "immediate effect without further procedural steps" and that they "override all inconsistent legislation and legal acts to the extent necessary to give [the orders] full effect."

101. The High Representative has successfully prevented the BiH courts from reviewing his actions. On 8 July 2006, the BiH Constitutional Court granted the appeal of two individuals the High Representative had removed from office. The Court concluded that their "right to an effective legal remedy under Article 13 of the European Convention [had] been violated," and ordered BiH to take certain measures "within the scope of their positive obligation to secure an effective legal remedy..."⁹¹

⁸⁷ *Assembly debate* on 23 June 2004 (20th Sitting) (*see* Doc. 10196, report of the Political Affairs Committee, rapporteur: Mr. Kirilov), *text adopted by the Assembly* on 23 June 2004 (20th Sitting).

⁸⁸ *Bilbija*, AP-953-05 (BiH Const. Ct. July 8, 2006).

⁸⁹ For comparison, *see* S.C. Res. 1244 (1999) regarding governmental administration in Kosovo and appointment of a Special Representative with detailed administrative powers. It is notable that the Special Representative in Kosovo established an Ombudsperson with authority to review the Special Representative's actions. UNMIK Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo. In BiH, by contrast, the High Representative has issued orders barring the courts and other BiH institutions from hearing or acting upon complaints of human rights or other violations of law by the High Representative.

⁹⁰ *See, e.g.* S.C. Res. 1244 (1999).

⁹¹ *Bilbija*, AP-953/05 (BiH Const. Ct. July 8, 2006).

102. The High Representative responded with an order purporting to nullify the Constitutional Court's decision and declaring that "any proceeding instituted before any court in Bosnia and Herzegovina, which challenges or takes issue in any way whatsoever with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent."⁹² The order also declared that: "Any step taken by any institution or authority in Bosnia and Herzegovina in order to establish any domestic mechanism to review the Decisions of the High Representative issued pursuant to his international mandate shall be considered by the High Representative as an attempt to undermine the implementation" of the Peace Agreement.⁹³

103. The High Representative has also asserted before the European Court of Human Rights—and the Court has ruled—that that Court lacks jurisdiction to hear claims arising from the High Representative's actions and that his actions do not engage the responsibility of BiH or other states.⁹⁴ The High Representative, however, has been inconsistent and entirely opportunistic in describing his legal status before courts and tribunals. As noted in paragraph 63 above, in a U.S. Federal Court proceeding, the High Representative stated that he was an "employee" of the states that are members of the PIC. This representation directly conflicts with his representation to the European Court of Human Rights that he is an "international official" whose actions cannot engage the responsibility of any state.

104. Thus, as matters stand, the High Representative has avoided any sort of judicial review of his orders, and the individuals subject to his sanctions have found no route to judicial relief from actions that are illegal or erroneous.

105. In 2005, the Venice Commission, after reviewing the powers of the High Representative and his exercise of them, concluded that: "The continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable."⁹⁵ The Commission found that the transfer of authority from the High Representative should take place "in the not too distant future," but that "even pending such transfer, the present practice will have to be substantially modified to make it acceptable as an interim solution."⁹⁶

106. It has now been five years since the Venice Commission issued these conclusions. Not only has the transfer of authority envisioned by the Commission not occurred, but no substantial modification of the procedure has been implemented to make the High Representative's role

⁹² Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (Mar. 23, 2007), art. 3.

⁹³ *Id.*, art. 2.

⁹⁴ Decision as to the Admissibility of Application nos. 36357/04, et al., by Dušan Berić and Others against Bosnia and Herzegovina (Eur. Ct. HR 2005).

⁹⁵ Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative, adopted at the sixty-second session of the European Commission for Democracy through Law (Venice Commission), CDL-AD (2005) 004, ¶ 98.

⁹⁶ *Id.*

acceptable even as an interim solution. The state of affairs that was unacceptable five years ago has by now long outlived any justification that was claimed for it.

E. The OHR has asserted control over the appointment of public officials.

107. The OHR's unlawful intrusion into the constitutional and democratic governance of BiH is not only found in its actions to impose laws and constitutional amendments by decree; to corrupt the independence and neutrality of the judicial system; and to punish and control public officials by removing or threatening to remove them from office; the OHR also seized control over the appointment of government officials in BiH. Since 2000, the OHR wrongfully claimed and exercised authority to block the appointment of individuals selected for government offices notwithstanding that the official appointment process had been done in accordance with law. As with dismissals, no evidence of unsuitability was given and no legal process was followed by the OHR.

108. The most recent example of this occurred on September 2, 2010. The High Representative declared the Western-Herzegovina Canton Assembly's approval of three government ministers to be null and void. The reason for the decision was not based on any alleged irregularities with the appointment process prescribed by law or evidence of unsuitability of the candidates. Rather, the OHR simply asserted that the authorities in the Canton had not followed the "regular practice" in respect of the High Representative's vetting of these three ministerial appointees and that the vetting by the High Representative "remains essential to the peace implementation process."⁹⁷

109. In response to the OHR's decision, the Canton submitted to the OHR's demands and allowed the OHR to vet the appointees. Shortly thereafter, the OHR informed the Canton that it had found the individuals to be acceptable and proclaimed the appointments effective. The OHR's nullifying of the appointments of September 2 had simply been an exercise by which the OHR could remind its "subjects" of its self-proclaimed sovereignty. While the High Representative announced on November 3, 2010, his intent to discontinue the vetting process, he reasserted the right to continue dismissal of officials. There is no such right as a matter of law. Its continued assertion is a continued affront to rule of law and democracy in BiH.

F. The OHR's highest priority is self preservation.

110. As the Council will recall, the RS Government has set out in detail in its three previous Reports the legal and policy reasons showing closure of the OHR to be an urgent priority. The High Representative and the OHR have not ceased their relentless efforts to maintain and extend their respective existences despite ever mounting evidence that they are barriers to both economic progress and to the European integration of BiH.

111. A revealing illustration has recently been provided by events surrounding the visit to Sarajevo of U.S. Secretary of State Clinton on October 12. In her public remarks and in an

⁹⁷ Office of the High Representative, Decision Nullifying and Voiding the Decision of the Assembly of the Western-Herzegovina Canton on Approval of the Government of the Western-Herzegovina Canton adopted at its Session held on 27 August 2010, Sept. 2, 2010.

appearance before students and civil society representatives, Secretary Clinton repeatedly urged internal consensus-building as the way forward for BiH. When a student asked the Secretary for direct foreign intervention against a BiH political leader she responded:

But ultimately, the decisions about moving forward have to be made internally. Outside pressure, outside criticism has a role to play, but it's been my experience in working with many nations coming out of conflict over the years that eventually people have to sit down and work it out themselves.⁹⁸

112. In sharp contrast to this sound advice, the High Representative, commenting to the press on the recent visits of Secretary Clinton and Commissioner Füle, said that the OHR's position was strengthened after the visits and said there are plans for "an increased number of associates at the OHR."⁹⁹

113. Past OHR actions demonstrate that self-preservation is this agency's highest priority. The careerist, long-serving bureaucrats there have much to lose personally if the OHR is closed. They are relatively well paid and assert much more political power than they could possibly find in any other diplomatic or policy post. They have no intention of voluntarily giving up their power, even though it is largely illegitimate. Note that one of the PIC Steering Board's stated conditions for the OHR's closure is: "a positive assessment of the situation in BiH by the PIC Steering Board, based on full compliance with the Dayton Peace Agreement."¹⁰⁰ Based upon present and past performance, neither the OHR nor the High Representative will ever acknowledge that their legitimate tasks have been fulfilled and that it is time to let BiH govern itself according to its Constitution. Moreover, both agencies, the OHR and the High Representative will continue to fight against any form of accountability or transparency for their conduct. This is particularly problematic since the High Representative is also the chair of the PIC Steering Board; thus, it is unreasonable to believe that the PIC will ever conclude that its stated conditions for OHR closure have been met.

G. The PIC's "5 plus 2" conditions are being cynically used to block the OHR's closure.

114. Under the PIC's formula of five objectives and two conditions for supporting the end of the High Representative's mission, the OHR's closure is impossible. Although a formula such as 5-plus-2 could work if all parties in BiH wanted the OHR to close, this has not been the case. The major Bosniak parties have expected the OHR to continue using its coercive powers to assist them in achieving their objectives, including sweeping reform of the BiH Constitution to replace the Dayton federal system with a centralized state.

115. This problem has been recognized by third-party experts. For example, in a recent report on BiH, the ICG raised this concern:

⁹⁸ Remarks by Secretary of State Hillary Rodham Clinton at Town Hall at the National Theatre in Sarajevo, Oct. 12, 2010.

⁹⁹ *Bosnia: High rep on constitutional changes*, TANJUG, Oct. 15, 2010.

¹⁰⁰ Communiqué of the Steering Board of the Peace Implementation Council, June 30, 2009.

The Bosniak parties, especially the SBiH and the SDP, who consider the OHR their main negotiating leverage, will not agree to complete the objectives required for closure until there is a deal on constitutional reform.¹⁰¹

Bosniak parties will not agree to a state property proposal until RS agrees to constitutional reform . . . [R]esolution of the state property issue is elusive not because the problem is inherently hard but because the PIC has linked it to Bosnia's most controversial issue, the fate of the OHR.¹⁰²

116. The international community must not allow such actions to continue holding hostage the closure of the OHR.

V. The RS Government is undertaking peaceful and legal efforts to restore the rule of law and constitutional governance.

117. The citizens of BiH are entitled to enjoy democratic and constitutional government and the rule of law. The RS government has committed itself to providing justice and relief for its citizens suffering from the OHR's violations of citizens human, civil and political rights described above. The RS Government's efforts have been, thus far, met by vague charges from the High Representative that such efforts are "anti-Dayton." The RS Government rejects such charges. The High Representative's word is not law; his actions are subject to law, as shown in this report. The RS Government must be free to express and defend its legal positions and views publically. The RS Government will continue to use every peaceful and legal means of restoring constitutional and democratic governance and the rule of law in BiH.

A. The RS Government has the legal duty to govern according to BiH and RS constitutions and domestic and international law. Decisions of the High Representative and the OHR in conflict with applicable law are legally invalid, and the RS Government will not recognize or enforce them.

118. Article I, paragraph 2 of the BiH Constitution requires that BiH must "be a free and democratic state" and the RS Government must conduct its affairs according to the rule of law. When the High Representative issues decisions and orders that violate provisions of BiH domestic and international law, the RS Government must base its response to such decisions and orders upon the applicable law. Of course the High Representative is also bound by international law.¹⁰³

119. In determining the applicable law, the RS Government must first look to the BiH Constitution and the Constitution of the RS. Next, the RS Government must look to any

¹⁰¹ ICG November 2009 Report, pp. 5-6.

¹⁰² *Id.*, p. 10. See also n. 17.

¹⁰³ See Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, RECUEIL DES COURS, 1957, vol. 92, issue II, at 46 ("[I]nternational law is automatically, *ipso facto*, and permanently binding on international persons—and in particular, States.").

applicable international obligations imposed upon BiH and/or the Entities by international law. Of first importance, in this respect, are applicable treaties. Those most directly concerned with orders of the High Representative would be the Dayton Accords and the human, political, and civil rights treaties specified in Annex 6 of the Framework Agreement. B&H has become a party to all of these treaties and agreements.

120. It is of considerable importance from a legal hierarchy standpoint to recognize that Article II of the BiH Constitution in paragraph 2 adopts as domestic law the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (“European Convention”). Paragraph 2 states that these shall have priority over all other domestic law. Paragraph 3 enumerates other rights, including many of those incorporated in the European Convention. Paragraph 6 of Article II requires that all courts, agencies, governmental organs and instrumentalities operated by or within the Entities shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2.

121. Article III, paragraph 3(b) specifies that “The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.” Among such principles of particular relevance to the relations between the High Representative and the RS Government and BiH are: *pacta sunt servanda*; the obligation of good faith in both performance and interpretation of a treaty; *ex injuria non oritur jus*; and non-intervention in internal affairs.¹⁰⁴

122. Also of considerable importance to the proper interpretation of the RS Government's legal responsibilities and duties are paragraphs 2 and 3 of Article I of the BiH Constitution. These articles state:

2. Democratic principles. Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free democratic elections.

3. Composition. Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter “the Entities”).

123. Paragraph 2 requires that the RS Government operate according to the rule of law and mandates governance by democratically elected officials. Paragraph 3 recognizes the primacy of the two Entities—Republika Srpska and the Federation of Bosnia and Herzegovina—as units of government. These paragraphs, among others, establish that the RS Government’s legal obligations under the BiH Constitution cannot be subordinate to decisions and orders of a non-democratically elected foreign official, such as the High Representative, particularly when his orders do not conform to the rule of law, including international law.

124. The obligations of: democratic governance; primacy of human, civil and political rights treaties and constitutional provisions; and rule of law-based governance in the BiH Constitution have particular force among the legal obligations of the RS Government because they are among

¹⁰⁴ See Herman Mosher, *General Principles of Law*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 511, 511-527 (1992).

the central principles and agreements included in the Dayton Accords. The plain language of the Dayton Accords and the inclusion of the above stated obligations in the BiH Constitution, which is Annex 4 of the Accords, give these obligations a foundational status among the international law obligations to which BiH and the High Representative are subject. In the overall context of the Dayton Accords, these obligations must be read to take precedence, in relations with the High Representative.

125. In addition, the RS Government must take account of Article III, paragraph 2(c) of the BiH Constitution which assigns wide responsibilities to the RS Government to protect the fundamental human, civil and political rights and fundamental freedoms of BiH citizens, guaranteed by the BiH Constitution.

126. The RS Government's responsibility, pursuant to the Dayton Accords, is to cooperate with the High Representative in connection with peace implementation does not supersede the RS Government's obligations under domestic and international law described above. When an order of the High Representative conflicts with the RS Government's duties under the constitutions of BiH and Republika Srpska or obligations under international law, the constitutional and legal obligations of BiH and RS law must have priority.

B. The High Representative and the OHR are subject to the Dayton Accords and to international human, civil and political rights agreements.

127. Annex 10 of the Dayton Accords is the High Representative's sole source of authority. Annex 10 does not give the High Representative anything resembling the sweeping powers that the High Representative asserts, such as the authority to enact, amend and repeal laws, remove and appoint judges and prosecutors, or remove and ban officials from office. Instead, Annex 10 instructs the High Representative to, for example, "facilitate," "mobilize," and "coordinate." Annex 10 provides that the High Representative "shall respect [the] autonomy" of civilian organizations and agencies "within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement."¹⁰⁵

128. Article V of Annex 10 provides, "The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement." This provision, as its plain language makes clear, does not extend the High Representative's interpretive authority beyond Annex 10 to any other parts of the Dayton Accords such as Annex 4, which is the BiH Constitution.¹⁰⁶ That responsibility falls to the designated authorities of BiH and the Entities or, in certain respects, to the Dayton Accords parties.

¹⁰⁵ Agreement on Civilian Implementation of the Peace Settlement (Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina), art. II(1)(c) (emphasis added).

¹⁰⁶ Confirming this plain language, in its first resolution about Bosnia after the Framework Agreement, the UN Security Council approved a resolution "reaffirm[ing] that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement . . ." S.C. Res. 1088 (1996). *See also, e.g.*, S.C. Res. 1174 (1998) ("reaffirm[ing] that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement . . .").

129. Moreover, Annex 10 must be read in the context of the rest of the Dayton Accords. Any reading of Annex 10 that would give the High Representative powers to enact legislation or overrule legally enacted legislation, appoint judges and prosecutors, or remove and ban officials without due process is wholly inconsistent with Annex 4 (the BiH Constitution) and Annex 6 (the Human, Civil and Political Rights Guarantees).

130. A legally valid interpretation of the High Representative's mandate in Annex 10 must also be guided by the cannon of treaty interpretation stating that an agreement not be construed to give what is not explicitly given. In cases where a treaty delegates to an international official responsibilities touching upon domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.¹⁰⁷

131. In sum, an order of the High Representative is legally invalid: (1) if it is inconsistent with the fundamental human, political and civil rights and freedoms specified as having legal priority in the BiH Constitution; (2) if it is inconsistent with general principles of international law, applicable treaties or other provisions of general international law; or (3) if it exceeds the authority granted the High Representative in Annex 10 by the parties to that agreement.

132. In some recent statements the High Representative has suggested that he is not bound by international agreements, presumably including the Dayton Accords and the international human, civil and political rights agreements to which BiH is a party. He has asserted that resolutions of the UN Security Council give him this "above the law" status. His position, however, is completely without legal justification. The High Representative cannot cite any specific UNSC decision for this proposition, nor does one exist. The so-called "Bonn Powers" were not granted by UNSC decisions but were simply asserted by the High Representative himself.¹⁰⁸

C. The RS Government is acting to restore human rights and provide justice to victims of the OHR.

133. High Representatives have handed down edicts dismissing and banning hundreds of citizens from public employment, forbidding them from engaging in political activity, freezing their bank accounts, and depriving them of their right to travel without any form of due process.

134. Never was any evidence put forward against those condemned. Never were these victims allowed any hearing, any chance to prove their innocence, any right to appeal. Most of these decrees are still in effect. The injuries they impose are continuing.

135. The victims include the highest government officials of Entities and BiH, as well as simple citizens. Their "crime" was to refuse to follow orders from the unelected, foreign officials who exercised unchecked powers.

¹⁰⁷ See W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT'L L. 231, 234 (1989).

¹⁰⁸ See, e.g. S.C. Res. 1896 (2009), S.C. Res. 1845 (2008), and S.C. Res. 1785 (2007), which do not use the decisional language required by UN law and practice necessary to empower states or organizations to act as agents of or on behalf of the UN. Compare, e.g.; S.C. Res. 1244 (1999) (providing such authorizations in the case of Kosovo).

136. As described in Section IV(D) above, some of those dismissed and banned from government employment or otherwise punished sought relief from BiH courts. High Representatives have prevented this. The High Representative has unlawfully ordered BiH's Constitutional Court, and all other courts and institutions within BiH, not to hear any claims against his activities. Orders of the High Representative have threatened to sanction any BiH official who complies with court decisions providing relief to parties injured by High Representative decisions. Indeed, as described below, one of the High Representative's primary activities has been to subject the BiH and Entities' judicial, civil, and criminal justice systems to his control. This effort has included OHR intervention into the deliberations of the highest judicial authority of BiH, the BiH Constitutional Court.

137. What is to be done to secure justice for these hundreds of victims? Since past High Representatives have prevented RS and BiH courts from providing justice, the RS Government has directed its legal counsel to prepare and file claims for relief of victims in other jurisdictions and before international human rights bodies. The RS Government will use all peaceful and legal means to secure justice for citizens whose most basic rights have been violated.

D. The High Representative attacked the independence of the Constitutional Court.

138. The first sentence of Article VI (Constitutional Court) Section 3. (Jurisdiction) states:

The Constitutional Court shall uphold this Constitution.

139. Article II of the Constitution requires all governmental authorities in BiH to ensure the "highest level of internationally recognized human rights and fundamental freedoms." The European Convention on Human Rights is applied directly as law in BiH with priority over all other law. Some 13 rights are specifically enumerated as being included but not by way of limitation.

140. Article X dealing with amendment to the Constitution forbids any amendment that would diminish any of the rights and freedoms referred to in Article II.

141. Clearly the fact that the Constitutional Court was bound to support human, civil and political rights and "fundamental freedoms" would be an enormous challenge to High Representatives and the OHR as they set about to rule BiH in defiance of these and other Constitutional provisions. One means of preventing a court challenge to his powers employed by the High Representative was that of summarily dismissing government officials, including judges. This practice is described in the sections below.

142. The High Representative also intervened directly with Constitutional Court judges to make known his wishes, as the international and constitutional law expert, Professor Joseph Marko, has noted in describing the Court's jurisprudence during its first five years. Professor Marko served as one of the three foreign judges of the Constitutional Court. He observed that the Court's assertion of even very limited jurisdiction over certain acts of the High Representative "was based upon the tacit consensus between the Court and the High

Representative that the Court in exercising its power . . . will always confirm the merits of his legislation as can be seen from those judgments.”¹⁰⁹

143. Later in the Court’s history, in certain cases dealing with the High Representative’s powers

. . . the Court failed to seek the opinion of the High Representative prior to making a decision, unlike the usual practice¹¹⁰

144. After an opinion in one such case was issued by the Court, Case No. U 13/02, the High Representative persuaded the President and two Vice Presidents of the Court to request a review of the decision at a new, plenary session of the Court. Before that could happen, new judges took office and the new Court ruled that the plenary review session could not be held as it had, in effect, been requested by the High Representative who had no power to do so.¹¹¹

145. Steiner and Ademovic also note the practice that certain Court decisions, including the one at issue in the High Representative’s review request, were “unpublished.”¹¹² Such a practice would seem inconsistent with Article VI section 2b of the Constitution which provides that the Court shall “... hold public proceedings and shall issue reasons for its decisions, *which shall be published.*” (emphasis added)

146. Article VI (1) of the BiH Constitution deals with the composition of the Constitutional Court. It provides that judges shall serve until age 70 unless they resign or are removed for cause *by consensus of the other judges.* A former senior legal official in the OHR reports that on one occasion the High Representative pressured the court to dismiss its president. When the three internationally appointed judges refused to support this effort, the High Representative issued an order unilaterally reducing their salaries.¹¹³

147. As described in Section IV(D) above, the High Representative ultimately resorted to ordering all courts and government agencies to disregard Constitutional Court decisions ruling his decisions inconsistent with the BiH Constitution.

E. The RS Government is committed to restoring BiH judicial and prosecutorial independence and the judicial structure established by the BiH Constitution.

148. A key element in establishing the authoritarian rule of the High Representative/OHR was destruction of the judicial independence of domestic courts and prosecutors offices. By making the judiciary subservient to the OHR, an important restraint on authoritarian rule in BiH was eliminated.

¹⁰⁹ Joseph Marko, *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina*, European Diversity and Autonomy Papers (July 2004), p.17 and 18.

¹¹⁰ Christian Steiner and Nedim Ademovic, *Constitution of Bosnia and Herzegovina Commentary* (2010), p. 821.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ MATTHEW PARRISH, *A FREE CITY IN THE BALKANS* (2009) p. 97.

149. The High Representative's attack on judicial independence was massive. For example, in 2002, the High Representative decreed that all judges and prosecutors were required to resign and reapply for their positions.¹¹⁴ He placed the burden of proof on each individual applicant to show that he was qualified.

150. The Council of Europe opposed this action. It pointed out that this process was nothing less than a disciplinary proceeding without the procedural protections of such a proceeding.¹¹⁵ An obvious and clearly intended result was to make judges and prosecutors compliant with the wishes of the High Representative upon whose satisfaction their continued careers would depend.

151. Not satisfied with making judges and prosecutors personally subservient, the High Representative created an entirely new system of courts and prosecutors over and above those constitutionally established for BiH. A new BiH State Court and related Prosecutor's Office was created which claims broad powers and jurisdiction.

1. The High Representative undermined judicial independence step by step.

152. Until the early part of the last decade, there existed no State Court or Prosecutor's Office in BiH for two reasons. First, the BiH and Entity constitutions reserve these judicial competencies to the Entities, which have their respective courts and prosecutors' offices. Second, the democratically and constitutionally elected representatives of BiH and the Entities did not see fit to establish a State Court or Prosecutors Office through legally prescribed procedures.

153. In 2000, however, the High Representative took it upon himself to impose a State Court upon BiH's citizens by unilaterally decreeing a "Law on Court of Bosnia and Herzegovina." In 2002, the High Representative, again deeming his word to be law, imposed on BiH a "Law on Prosecutor's Office of Bosnia and Herzegovina." Over time, through a spate of further unilateral decrees of the High Representative, the State Court and Prosecutor's Office have grown and expanded all without benefit of legally valid procedures. By way of example:

- In 2002 and then again in 2003, the High Representative by decree vastly expanded the jurisdiction of the imposed institutions. This included adding jurisdiction over certain crimes governed by Entity law, which further encroached upon the clear jurisdictions of the Entities' judicial systems. Also in 2002, the High Representative by decree appointed the new State Court's seven judges.
- In 2003, the High Representative decreed that a limited number of foreigners would be appointed to positions as judges and prosecutors, in place of BiH citizens. According to the decrees, the foreign judges and prosecutors could only be appointed during a transitional period of four years. The High Representative went on to fill each of these positions by a series of decrees.

¹¹⁴ Gerhard Knaus and Felix Martin, *Travails of the European Raj*, 14(3) J. DEMOCRACY (2003), p. 61.

¹¹⁵ Gerhard Knaus and Felix Martin, *Travails of the European Raj*, 14(3) J. DEMOCRACY (2003), pp. 64-65.

- In October 2003, the High Representative issued a decree removing the limits to the number of foreigners who could serve as judges and prosecutors.
- In 2003 and 2004, these foreign judges and prosecutors were granted near-absolute immunity from prosecution for any violations of law, a privilege enjoyed in other countries only by foreign diplomats, not by judges and prosecutors.
- In 2004, the High Representative by decree greatly broadened the types of positions foreign judges could fill.
- Also in 2004, the jurisdiction of the State Court and Prosecutor's Office was further expanded and the transitional period for employing foreign judges and prosecutors was extended.
- In 2004, 2005, and 2006, the High Representative continued to appoint foreign judges and prosecutors by decree.

154. Step by step, these carefully devised arrangements resulted in intensified and more detailed domination of the criminal and civil justice system by High Representative appointees. By the end of 2009, for example, nearly half of all prosecutors in the section on Organized Crime, Economic Crime and Corruption were foreigners, including the Deputy Prosecutor, who headed that section.

155. The foreign judges and prosecutors in BiH, who claim extraordinary immunity, operate under powerful incentives to obey and please the High Representative and other foreign officials who are involved in their appointment, setting their terms of work and compensation. The system has been constructed so that these appointees' loyalty is not to the law and Constitution of BiH but to the foreign appointing authorities in the OHR. The actions of the State Court and Prosecutor's Office bear this out. Their criminal justice system abuses have been the subject of official inquiry.

156. In December 2009, the mandate of the foreign judges was set to end, according to the law. The BiH Parliament took up the issue of extending their mandates by amending the law, but for good reason, voted against an extension. In response, the High Representative issued an order on December 14 that "overruled" the decision of the democratically elected members of the BiH Parliament. The High Representative ordered that foreign judges and prosecutors remain—either as judges and prosecutors or behind-the-scenes authorities—now with the title, "advisors."

2. The RS Government's duty is to the rule of law.

157. The RS Government is obligated to conduct its affairs according to the rule of law—including with regard to the State Court and Prosecutor's Office. This is required by the domestic law of BiH, including the BiH and RS Constitutions, and applicable international law.

158. The High Representative lacks the legal authority to issue the decisions that established and altered the State Court and Prosecutor's Office. The High Representative's legal mandate is

established by the agreement set out in Annex 10 of the Dayton Accords. Annex 10 does not give the High Representative power to violate the Dayton Accords, other elements of international law or the Constitution of BiH. Annex 10 does not remotely suggest that the HR has the power to enact any legislation by decree, much less the power to establish courts with national jurisdiction and with the authority to overrule constitutionally mandated courts in the Entities. Annex 10 certainly does not require the BiH Constitutional Court to submit their proposed decisions to the High Representative for approval. Certainly Annex 10 does not allow the HR to overrule legally promulgated decisions of the elected members of BiH's Parliamentary Assembly. Nor does Annex 10 grant the HR authority to undermine the domestic legal system by appointing and removing judges and prosecutors in BiH—be they foreigners or BiH citizens.

159. The RS Government cannot accept as legally valid the High Representative's December 14, 2009 decision extending the service of foreign judges and prosecutors. The acts of BiH State Court and Prosecutor's Office are also of doubtful legal validity. These agencies were created and operate pursuant to decisions imposed by the High Representative, in contravention of BiH, Entity and international law. In its third report to the Security Council, the RS Government set out in full its legal position regarding these acts of the High Representative.

F. Referenda play a legitimate role in a democracy. The RS Government will use them as appropriate to restore constitutional and democratic government.

160. The RS Government intends to hold a referendum to allow the citizens of the RS to express their views on whether the RS Government should accept and implement actions of the High Representative extending the mandate of foreign judges and prosecutors, which are contrary to the Dayton Accords, human rights treaties and other principles of international law binding upon the RS Government.

161. In scores of speeches and statements during the recent election period, the High Representative has repeatedly suggested that the governing officials of BiH and the Entities were not representing their constituents' views and that the High Representative's actions are more aligned with their interests. In addition, the High Representative has frequently called on citizens to make their voices heard. Yet the High Representative is now opposing a new RS referendum law and the holding of referenda by the RS Government that would boost government accountability and increase opportunities for RS citizens to make their views known.¹¹⁶

1. Referenda are widely used by governments across Europe and around the world as a mechanism for insuring democratic rule.

162. It is all the more important for RS citizens to be heard in a country in which a single, unelected official claims extraordinary peremptory powers free from any court review or other limit. The RS Constitution has long specifically provided for referenda, stating at Article 77 that the RS National Assembly ("RSNA") may decide on individual issues after a vote of the citizens

¹¹⁶ Office of the High Representative, *Inzko in Banja Luka: RS politicians are not taking smart decisions*, Feb. 11, 2010.

in a referendum.¹¹⁷ Article 70 of the RS Constitution gives the RSNA the power to organize a referendum. Moreover, the RS has had a statute providing for referenda since 1993, and a new RS Law on Referendum adopted on February 10, 2010.

2. The planned referendum is lawful.

163. There is nothing in the nature of the referendum the RS Government is planning that would render it unlawful. Although the RS Government has not determined the precise language of any referendum questions, it intends to, in line with RSNA Conclusions dated October 1, 2010, propose a referendum to be held regarding the High Representative's decisions extending the mandate of foreign judges and prosecutors of the war crime department. The High Representative's order was contrary to the BiH Parliamentary Assembly's action which refused to continue the use of foreign judges and prosecutors. The proposed referendum is plainly suitable under the Council of Europe's standards. The Council's Parliamentary Assembly, in Resolution 1121, invited member states "to regard all subjects as suitable for being submitted to a referendum, with the exception of those which call in question universal and intangible values such as the human rights defined in the Universal Declaration of Human Rights and the European Convention of Human Rights, and the basic values of democracy in general and parliamentary democracy in particular."¹¹⁸

164. The proposed referendum does not question universal intangible values such as human rights or the basic values of democracy in general and parliamentary democracy in particular. Indeed, the proposed referendum will be an exercise and example of representative democracy and human rights, contrasting sharply with rule by a High Representative who shows disdain for such fundamental requirements of BiH and European law.

VI. The EU accession process must be conventional and not politicized. Constitutional change is neither appropriate nor necessary at this pre-application stage, but BiH can still make progress toward accession.

165. The RS Government supports EU accession and is committed to its success. However, the accession process cannot be misused—as it has been—by local and international parties as a pretext for sweeping constitutional reforms unnecessary for accession, but pursued to achieve unlawful political agendas. In the past, negotiations over potential changes to the BiH Constitution, in the name of EU accession, have lacked transparency and have been used by non-EU parties, including the Bosniak parties and the OHR, to press agendas unrelated to EU membership requirements. These agendas have focused on transforming BiH's constitution to centralize power in Sarajevo and scrap the Dayton structures that protect entity autonomy and equality of BiH's Constituent Peoples. Thus, there is rightly a great deal of suspicion among RS citizens over talks on constitutional changes.

¹¹⁷ In addition, Amendment XXXII to Article 76, paragraph 1 of the RS Constitution provides that the right to propose laws, other regulations and enactments lies with the President of the Republic, Government, every representative of the Assembly, or at least 3,000 voters.

¹¹⁸ Council of Europe, Parliamentary Assembly Res. 1121 (1997), 22 April 1997, para. 15(ii).

166. To restore the trust necessary for EU accession to be achieved, efforts toward EU accession must follow a conventional process, consistent with EU practice, under which negotiations over constitutional amendments take place in later stages. Negotiations over constitutional changes certainly cannot begin until the OHR departs, with the single exception of a narrow amendment to satisfy the order of the European Court of Human Rights in *Sejdić and Finci v. BiH*.

167. At the same time, there is much that can be accomplished now aside from constitutional reform to further the accession process. Until the OHR departs, the RS will work diligently toward bringing BiH into compliance with the Copenhagen Criteria, by addressing the issues in the *Finci* case, and in implementing the SAA and the Interim Agreement on trade. Constitutional changes that may eventually be necessary for EU accession must be the result of a transparent and lawful process and a domestic consensus achieved without foreign interference. In addition, any such constitutional changes must retain the fundamental protections established in the Dayton Accords.

A. BiH's EU integration should follow a conventional process in which negotiation of any constitutional changes comes in later stages.

168. It is important that BiH's EU integration efforts follow a conventional process consistent with EU practice. It would be contrary to recent EU accessions for BiH to make changes to its constitution in the early stages of the integration process. None of the states that have become EU members in recent decades has amended its constitution before filing its application for membership. In any event, as explained below, talks on constitutional change cannot take place as long as the OHR is in BiH.

1. At this very early stage of the EU integration process, constitutional changes are wholly unnecessary and premature.

169. Whatever constitutional changes might eventually be required for BiH to become an EU member (beyond the *Finci* amendment) are completely unnecessary at this very early stage of the accession process.

170. There is no need for BiH to amend its constitution before applying for membership. As soon as the OHR has departed, a BiH application for EU membership will become eligible for consideration. EU officials have consistently made clear that BiH is not required to make any changes to its constitution before applying for EU membership.¹¹⁹

171. Rushing constitutional changes before an application is even filed in many ways defeats the purposes of later stages of the accession process. After an application is filed, BiH and EU bodies will move forward on a long series of steps that must take place even before membership negotiations begin. One key step is a potential candidate's responses to a questionnaire hundreds of pages long. The questionnaire and other steps in the accession process help define for both the potential candidate and the EU the areas in which the country is well prepared for accession

¹¹⁹ Olli Rehn, EU Commissioner for Enlargement, *Towards a European Era for Bosnia and Herzegovina: The Way Ahead*, Address to Parliament of Bosnia and Herzegovina, July 24, 2009.

and where it is lacking. It would be foolish to short-circuit this process of give and take by attempting to rush through constitutional changes.

172. It may be that no changes to the BiH Constitution at all are required. Florian Bieber of the University of Kent has recently concluded that outside of addressing the *Finci* decision, “no *constitutional* change is, strictly speaking, necessary for Bosnia to move towards further EU integration, and should not become a condition for doing so”¹²⁰ In a recent interview, Prof. Bieber said that “it is a mistake to claim that constitutional changes are required for a functional state,” that “political issues and blockades are not results of the Constitution,” and that “constitutional change does not change the political climate and the will of different political parties in power to make compromises.” Prof. Bieber added, “I believe that it is far more important to reach a mutual understanding on priorities in the reform process in BiH and to take that path.”¹²¹

2. Constitutional changes are not required for OHR closure.

173. In its most recent communiqué, on June 30, 2010, the PIC Steering Board once again reiterated that “constitutional changes are not a part of the objectives and conditions for closure of the OHR”¹²² Despite efforts by the High Representative and others to suggest otherwise, there is simply no link between the enactment of constitutional changes and the conditions for OHR closure. In fact, as explained in the next section, talks on constitutional changes cannot take place until the OHR departs BiH. However, as described in Section III(A) above, the EU has repeatedly made clear that OHR closure is a requirement for BiH’s membership application to the EU.

3. The OHR’s presence makes negotiations on constitutional change impossible. The RS Government will only participate in negotiations on constitutional reform after the OHR is closed.

174. With the exception of an amendment tailored to resolving the problems identified by the European Court of Human Rights in its *Finci* decision, changes to the BiH Constitution cannot be considered until the OHR is closed. Constitutional changes cannot be enacted while the OHR remains in place because the OHR stifles the necessary consensus building among BiH’s political leaders. The OHR, like the Bosniak parties, supports a centralization of the BiH system that would eliminate the fundamental protections guaranteed in the Dayton Accords. As long as the OHR is in BiH, the Bosniak parties will not negotiate in good faith because they will continue to look to the OHR to pressure other parties in support of their shared positions. As the ICG has concluded, “The OHR has become more a part of Bosnia’s political disputes than a facilitator of solutions”¹²³ In addition, the ICG observed that “keeping the OHR open will

¹²⁰ Florian Bieber, *Constitutional reform in Bosnia and Herzegovina: preparing for EU accession*, European Policy Centre Issue Brief, Apr. 2010, p. 3.

¹²¹ Bieber: *Manje "šargarepe" pomogle bi BiH*, RADIO SLOBODNA EVROPA, Nov. 30, 2010, available at http://www.slobodnaevropa.org/content/intervju_florian_biber/2233859.html.

¹²² Communiqué of the Steering Board of the Peace Implementation Council, June 30, 2010.

¹²³ ICG November 2009 Report, p. 1.

not push [BiH's] citizens toward reform and may sow enough discord to push reform out of reach."¹²⁴

175. As is mentioned above, some in the international community are calling for the High Representative to be replaced upon his departure with another international official who would assert powers similar to those asserted by the OHR. For all of the same reasons as the High Representative, the presence of an official who asserts similar powers would make constitutional negotiations impossible.

176. If the EU believes amendments to the BiH constitution are required for EU accession, the RS will discuss such proposals, but only after the OHR's departure.

B. The RS will continue working toward BiH's EU integration while the OHR remains in BiH.

177. Until the OHR departs, the RS is committed to working with the EU to accomplish whatever integration tasks are feasible to accomplish during the OHR's presence. First, the RS will continue working for BiH's fulfillment of the Copenhagen Criteria, principally by seeking the departure of the OHR and the amendment of the BiH Constitution to be consistent with the *Finci* decision. Second, the RS will continue working to implement the SAA and the Interim Agreement.

1. The RS will work to ensure BiH's fulfillment of the Copenhagen Criteria, including by seeking a constitutional amendment ensuring BiH's compliance with the *Finci* decision.

178. The RS will continue to work toward BiH's full satisfaction of the Copenhagen Criteria. As explained above, BiH at present cannot fulfill the political criterion because of the continued presence of the OHR as a non-democratic, unlawful overseer, and a frequent violator of human rights. The RS Government will work to prevent the continuance of OHR's illegal actions and for its closure in order to restore full sovereignty and democracy to BiH.

179. Another barrier to BiH's satisfaction of the political criterion is its failure, thus far, to resolve the constitutional deficiencies identified by the European Court of Human Rights in its December 2009 *Finci* decision. The RS Government continues to stand ready to amend the BiH Constitution immediately in order to comply with the court's decision. Action is now long overdue. Unfortunately, the main Bosniak parties have spurned the RS Government's proposals to quickly resolve this issue by amending the election eligibility provisions of the BiH Constitution. These parties are refusing to go along with the relatively simple fixes necessary to comply with *Finci* unless the RS agrees to a radical transformation of the BiH Constitution, which would cast aside the careful balance struck in the Dayton Accords and transform BiH into a centralized state. For this reason, what should have been easily achievable constitutional amendments have not been enacted.

¹²⁴ *Id.*, p. 16.

180. Even the High Representative has acknowledged the Federation’s refusal to enact the necessary targeted reforms. In his most recent speech to the Security Council on May 24, he said, “While Republika Srpska representatives would agree to narrow constitutional amendments that would implement the 22 December ruling, Federation politicians, on their side, insist on more wide-ranging changes, seeking to use the court’s verdict to promote their own—very different—visions of how the country should be restructured.”¹²⁵

181. The urgent need for modest changes to the Constitution in response to the ECHR’s decision should not be used as a pretext to push a sweeping and highly controversial transformation of the Dayton Constitution.

2. The RS will work to implement the SAA and Interim Agreement.

182. The RS Government will continue working to implement the SAA and the Interim Agreement. Among the tasks necessary for the implementation of the SAA is the approximation of RS, Federation and BiH legislation and policies to the *acquis*. The RS Government has worked steadily to do this for RS legislation and policies, and it will continue to do so. The RS Government will also do everything it can to ensure that the BiH government conforms legislation and policies to the *acquis* as quickly as possible.

C. Any changes to the BiH Constitution must result from a transparent and legal process and a domestic consensus achieved without interference from abroad.

1. Changes to the BiH Constitution must be effected transparently and in accordance with constitutional procedures and international law.

183. Any constitutional reforms must follow the amendment process prescribed in Article X of the BiH Constitution. In addition, pursuant to international law, changes to the Constitution (Annex 4 of the Dayton Accords), which is an international treaty, require agreement between the Parties to Annex 4 to amend the treaty.¹²⁶

184. The process of amending the constitution must not take place behind closed doors; any amendments must be effected through a transparent process that keeps citizens informed of developments. Transparency will help ensure that constitutional changes reflect citizens’ views. It will also improve public acceptance of them.

¹²⁵ Speech by High Representative Valentin Inzko To the UN Security Council, May 24, 2010.

¹²⁶ In 2005, the European Court of Human Rights asked the Venice Commission for its opinion about whether Annexes 4 and 6 to the Dayton Accords are “unilateral undertakings given by Bosnia and Herzegovina” or international treaties. In its *Amicus Curiae* Opinion, the Venice Commission concluded that the annexes to the Framework Agreement “are to be considered an integral part thereof, so they must be considered as international treaties. Their character and interpretation are therefore governed by international law, in particular the Vienna Convention on the Law of Treaties.” Because Annex 4 is in the nature of a treaty, its parties—including Republika Srpska—must consent to its amendment.

2. Any amendments to the Constitution must be the result of a consensus achieved by BiH's elected officials without imposition from abroad.

185. As the next section of this report explains, the RS Government is committed to working with parties throughout BiH to build consensus for reforms consistent with the Dayton framework. So long as the OHR remains, such consensus will be difficult to achieve, but building internal consensus through the hard work of bargaining and compromise among leaders elected by BiH citizens is the only path to long-term stability.

186. Any changes to the BiH Constitution must not be imposed on the citizens of BiH from foreign countries. First, the imposition of changes from abroad would violate the Annex 4 of the Dayton Accords (the BiH Constitution), which prescribes the requirements for its amendment. Second, the imposition of such changes would violate international law. For example, it would breach the legal duty not to intervene in matters within the domestic jurisdiction of another State—including with respect to BiH's "inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state."¹²⁷ Finally, such an imposition would foment instability in BiH. BiH citizens would emphatically reject as illegitimate any constitutional changes that were seen as having been imposed from abroad.

3. Negotiations on constitutional change for EU accession must be conducted with EU representatives, not the OHR, PIC or non-EU member states.

187. Negotiations on what constitutional changes may be necessary for EU accession should be between political leaders from BiH and the appropriate EU officials. It is not appropriate or productive for the OHR or non-EU members of the PIC to seek to inject themselves into EU negotiations. Such interference only serves to increase distrust of the process among RS citizens and set back negotiations.

D. The BiH Constitution must maintain its decentralized structure and its protections for Constituent Peoples.

1. The decentralized structure of the Dayton Constitution is consistent with EU standards and the European trend toward devolution.

188. The decentralized organization of BiH established in Dayton Constitution is consistent with EU standards. As noted above, the political criterion of the Copenhagen Criteria requires "stable institutions to guarantee democracy, the rule of law, human rights and respect for and protection of minorities." The BiH Constitution provides for democratic institutions, the rule of law, human rights, and respect for and protection of minorities, though it must be amended to satisfy the *Finci* decision, as explained above. The main factor preventing BiH from satisfying the political criterion is OHR's continued presence in BiH.

¹²⁷ Declaration on Principles of International Law Concerning Friendly Relations And Cooperation Among States, G.A. Res. 2625 (XXV) (1970).

189. The Constitution is also consistent with the economic criterion: “a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU's internal market.” As explained in Section II(C) above, decentralized structures are economically beneficial, especially in states—such as BiH—in which political preferences vary widely between regions. The BiH Constitution’s consistency with the economic criterion is also demonstrated by the RS Government’s implementation of far-reaching market reforms to boost competitiveness. The Federation’s failure to institute such reforms is due not to the BiH Constitution but to its own political culture.

190. Nor is the BiH Constitution inconsistent with the *acquis* criterion (“the ability to take on all the obligations of membership, i.e. the entire body of EU law and policy known as the *acquis communautaire*, and adherence to the aims of political, economic and monetary union”). The BiH Government has, consistent with the SAA, been gradually approximating its laws and regulations to the *acquis*. The RS Government has also moved steadily to approximate its laws and regulations to the *acquis*. The Federation, so far, is lagging in this respect, but the cause is the Federation’s own political problems, not the BiH Constitution.

191. The fact that a decentralized federal system is consistent with the obligations of membership in the EU is demonstrated each day by the current EU members that have similarly decentralized systems, such as Germany, Spain, and Belgium. The level of government in an EU member state that implements EU laws varies from state to state and depending on the area of law. In some states, such as Germany, a level of government lower than the state level takes on a central role in implementing EU laws. In other states, the central government plays a more important role. The EU wisely does not mandate a single approach.

192. The wide range of responsibilities of territorial units below the state level in countries such as Germany, Spain, Belgium, and Italy does not prevent these countries from fulfilling their responsibilities as EU members. There is no reason that a similarly decentralized state such as BiH cannot conform its laws and regulations to the *acquis* and otherwise fulfill the obligations of an EU member.

193. BiH’s decentralized structure also reflects the core EU principle of subsidiarity, according to which “decisions are taken as closely as possible to the citizen.”

194. Moreover, the decentralized structure of the BiH Constitution is consistent with the widespread trend of decentralization in the EU and worldwide. For example, Italy in 2001 approved a constitutional reform giving its regions very broad autonomy.¹²⁸ Spain’s Autonomous Communities, first established in 1978, have dramatically increased their responsibilities and now have broad legislative and executive authority. Even the United Kingdom, which has a unitary system of government, has recently devolved significant autonomy to Scotland, Wales, and Northern Ireland. According to a Council of Europe study,

¹²⁸ Committee on the Environment, Agriculture and Local and Regional Affairs of the Council of Europe Parliamentary Assembly, *Regionalisation in Europe*, Sept 14, 2007, p. 8.

“Most of the larger countries of Europe have a well-developed sub-state level of government formed of regions enjoying considerable autonomy and legislative powers.”¹²⁹

195. As the study said, “Regional autonomy must be perceived as a means of enhancing democracy and giving it a firmer foothold in our countries, in parallel with the European unification process and against the background of globalisation.”¹³⁰ Decentralized structures such as the BiH Constitution are perfectly consistent with membership in the EU.

2. Entity autonomy and protections for the rights of BiH’s Constituent Peoples are essential to BiH stability and consistent with effective government.

196. BiH was constituted by three Constituent Peoples with widely diverging political preferences. The protections established in the Dayton Constitution give members of each of BiH’s Constituent Peoples the crucial assurance that neither the state nor any single Constituent People or political party will not trample over their interests. Structures and mechanisms such as those established in the BiH Constitution are consistent with effective government and have been used by successful democracies in Europe and elsewhere.

197. Any reforms must retain the federal structure and mechanisms established by the Dayton Accords to safeguard the vital interests of BiH’s Constituent Peoples. Replacing this system—the indispensable foundation of the Dayton Accords—with a more centralized scheme would remove the protections essential for each of BiH’s Constituent Peoples. Legitimate reforms are possible within the Dayton framework, but the framework must be preserved.

198. The existence and stability of BiH is based upon the fundamental principle that BiH consists not of minorities, but three equal Constituent Peoples. The BiH Constitution, set forth in Annex 4 of the Dayton Peace Accords, is based on this important principle. The Constitution proclaims that BiH “shall consist of two Entities” and allocates competencies in a manner that creates a decentralized structure. The Constitution also provides important safeguards to uphold this principle and ensure that the interests vital to each of the constituent Peoples are respected. This structure is the result of agreement among these three Peoples, codified by treaty, which not only ended the war between them, but established a framework wherein they might live together as citizens of the same State. This structure, while perhaps not perfect, takes account of the realities of BiH.

199. Attempts by states and other subjects of international law to interfere with the treaty obligations set forth in the Dayton Accords should be of great concern to the Security Council. Indeed, such actions could pose a threat to international peace and security. Any system of government that does not enjoy a consensus from within—but is imposed from without—will not be considered legitimate by its own citizens. This is particularly true with respect to changing the federal structure agreed upon by the parties in the Dayton Accords, which was carefully crafted to take account of the vital interests of each of the Constituent Peoples. Replacing this structure with a unitary system removes the protections essential for all of BiH’s

¹²⁹ *Id.*, p. 9.

¹³⁰ *Id.*, p. 1.

Constituent Peoples. It is precisely these protections, an essential centerpiece of the Dayton Accords, which encourage cooperation and consensus building today and make BiH a viable state.

200. Although the BiH scheme is not identical to other constitutional systems, similar mechanisms of regional autonomy and protections that safeguard the interests of constituent peoples are found in successful democracies both inside and outside Europe. Federal structures in EU member states along with other democracies have been successful forms of governance for states that consist of diverse peoples. Examples include Spain, Belgium, Italy, Switzerland, and Canada, among many others.

201. Switzerland, of course, is widely known for the effectiveness of its government institutions. It protects the interests of its diverse language and dialect groups in part by vesting broad autonomy in 26 cantons. The autonomy of Swiss cantons is so broad that they are entitled to conclude international treaties.¹³¹ In Italy's ethnically mixed Autonomous Province of South Tyrol a quota system based on ethnicity applies to the composition of political organs, public administration, civil service positions, judicial appointments, and allocation of funds for public purposes.¹³²

3. The RS supports remedying the unequal position of the Croat People in the Federation.

202. As the ICG recently reported, the Federation is near collapse and in serious need of reform. One of the serious problems in the Federation is that the Croat Constituent People's vital interests have not been protected due to their unequal position within the existing structure of the Federation. Bosniak parties' practice of "outvoting" Croats in the Federation has, according to a 2008 report to the Security Council by the High Representative, "increased political tensions between the two ethnic groups and [was] indicative of broader concerns about the position of the Croats in the Federation."¹³³ In 2002, High Representative Wolfgang Petritsch decreed amendments to the Entities' constitutions that, according to the ICG, had the effect of removing "the most potent protective mechanism the Croats had wielded."¹³⁴ The Federation's Constitution includes a vital national interest ("VNI") clause, under which Bosniaks or Croats may block legislation that undermines its vital interests. But, according to the ICG, "new rules made the VNI mechanism ineffective"¹³⁵

203. To remedy the unequal position of the Croats in the Federation, the head of the leading Croat political party HDZ, Dragan Čović, has called for the creation of a third entity in BiH within the existing Federation through constitutional reform.

¹³¹ *Id.*

¹³² JENS WOELK ET AL, ED., *TOLERANCE THROUGH LAW: SELF GOVERNANCE AND GROUP RIGHTS IN SOUTH TYROL* (2008).

¹³³ ICG September 2010 Report, p. 5

¹³⁴ *Id.*, p. 6.

¹³⁵ *Id.*

204. The RS Government recognizes the unfair treatment of the Croats by their Federation partner and supports the desire of the Croats for their own entity, so long as it is achieved through peaceful means; does not violate the political and territorial integrity of the RS; and preserves the decentralized structure and political safeguards established in the Dayton Peace Accords.

4. No current EU members or candidate states have been required to centralize their constitutional structures as conditions for EU membership.

205. No EU member or candidate state has ever been required to centralize its constitutional structure in order to accede to the EU. Indeed, during the years of their accession processes, some EU members, such as the Czech Republic and Slovakia, *decentralized* their government systems. Many other EU members, including Belgium, Germany, and Spain, have long had highly decentralized constitutional structures.

206. One of the reasons the EU has succeeded in uniting so many of Europe's democracies is that it has welcomed a diversity of governmental systems suited to states' differing histories and political cultures. While a unitary system may be suitable for certain countries, it would be entirely unworkable in a country like Belgium—or BiH. The EU should continue its tradition of working toward an applicant state's fulfillment of the Copenhagen Criteria rather than trying to prescribe for the state a new form of government.

VII. The RS Government will work hard to build domestic consensus and international support for efficient government based upon the Dayton framework.

207. With the elections in BiH successfully completed, now is the time for elected officials within BiH to work together—without external interference—to reach consensus on issues that will improve governance in BiH and the quality of life for its citizens. Progress will require mutual respect for the equality and vital interests of BiH's Constituent Peoples at both the Entity and state level; it will require ceasing to look for non-BiH parties to impose maximalist positions in hopes of fundamentally transforming BiH in order to consolidate power to the detriment of other Peoples. As the ICG concluded its latest report on BiH, "Only by endorsing compromise politics . . . and accepting the reality that the country's future is as a decentralized state can Bosnia's leaders revitalize first the Federation and then Bosnia itself."¹³⁶ The RS Government is prepared to cooperate fully in these efforts and calls upon other political leaders within the Federation and at the state level to participate in good faith towards this end. The consensus on which the legitimacy of all governments ultimately rests must come from within.

A. The RS Government is committed to building broad consensus to improve governance through legitimate reforms.

208. The RS Government is committed to furthering effective governance through legitimate reforms, including to achieve EU accession and integration into European structures. On the

¹³⁶ *Id.*, p. 23.

basis of BiH's constitution, and as a practical matter, the Entities will play an important part in this process.

209. The RS has demonstrated this commitment by its successful participation in implementation of the Interim Agreement and the SAA, as part of EU accession. As the EU and others acknowledge, the RS is far ahead of the Federation and the BiH State institutions in carrying out reforms of laws and regulations to conform to EU standards and the *acquis*.

210. The RS's commitment to legitimate reform is also evident by its good faith negotiation and offers of compromise with respect to many important issues. To cite only a few of many examples: (1) the RS Government reached consensus on resolving the ownership of Defense Property by executing a written agreement with the Federation and the BiH Council of Ministers in 2007; (2) agreement was reached by the RS's leading political party (the SNSD) on ownership of State Property in the fall of 2008 and early 2009, in accordance with the PIC's functional and territorial criteria; (3) the RS Government in early 2009 reached compromise on a constitutional amendment relating to Brčko and its status *vis-a-vis* the Constitutional Court; (4) during the failed Butmir talks in the fall of 2009, the RS Government made serious proposals of reform and offers of compromise; (5) the RS Government showed its support for joining NATO's Membership Action Plan and made offers in the summer of 2010 that would have resolved the issue of immovable defense property; (6) also in the summer of 2010, the government offered a compromise on the BiH Census legislation, agreeing to allow the legislation to postpone implementation of the new census data to a future fixed date. In most of these instances, the agreements reached were later breached by the other parties, usually with the support of the High Representative, or the concessions offered in good faith were rejected in favor of maximalist positions.

211. As further evidence of the RS's commitment to improve governance, on May 14, 2009, the RSNA issued Conclusions calling for a serious, internal assessment and discussion among the Entity and State institutions as to how State and Entity government elements can most efficiently and effectively allocate governmental competencies. In particular, the Conclusions requested the Parliamentary Assembly of the BiH, Council of Ministers of BiH, and institutions of the Federation to join the RSNA and the RS Government in addressing these critical issues in order to pursue more efficient and effective government performance.¹³⁷

B. If given the political space, democratically elected leaders of BiH can and will negotiate with each other to produce a national consensus.

212. To be considered legitimate by the citizens of BiH, the reform process must be transparent and public debate encouraged. As in other constitutional democracies, reform of the constitution, as compared to legislation and regulations, must be approached with great care. It

¹³⁷ Unfortunately, the High Representative inappropriately condemned these Conclusions rather than support the peaceful review and resolution of the proper allocation of competencies among the Entity and BiH institutions—the type of debate which is welcome, not condemned, in constitutional, federal democracies. The OHR view was that any return of competencies to the entities would be a violation of the Dayton Accords while transfer of competencies from the Entities to the state government was permitted by Dayton. Such a view is incompatible with *inter alia* the Preamble and Article V of the Dayton Accords and Articles I and III of Annex 4 (BiH Constitution).

is essential to allow the time required to build a high level of consensus. Reform also must be conducted in accordance with the legal procedures for amendment required by the Constitution.

213. Constitutional reform and EU accession are domestic issues for BiH citizens to control. Neither reform nor accession are requirements of the Dayton Accords, and consequently, the issues are clearly outside the scope of the High Representative's mandate and authority and the scope of peace implementation. Thus, as a matter of law, progress toward EU integration and constitutional reform cannot be imposed by the High Representative or PIC or be a condition for closure of the OHR. Attempts to impose constitutional change by the High Representative, PIC, or other members of the international community have been both counterproductive to legitimate and enduring reform and an unlawful intrusion into the domestic affairs of a sovereign state.¹³⁸

VIII. Conclusion

214. The international community has made many positive contributions to BiH's recovery from the conflicts of the 1990s. Unfortunately, as this report and the RS Government's previous three reports to the Security Council have shown for more than a decade, the activities of the High Representative and the OHR have undermined BiH and Entity institutions, acted in disregard of the BiH Constitution and international obligations of BiH, and have punished hundreds of BiH citizens in a manner contrary to domestic and international law. While claiming to promote the rule of law and implement the Dayton Accords, the OHR and many High Representatives have acted in complete disregard of both. Among the many adverse effects of these illegal actions, perhaps the most pernicious has been disruption of the essential process of building domestic political consensus in support of policies that could command broad support from all citizens.

215. The RS government urges the Security Council not to support any further actions or programs of the international community affecting BiH which are inconsistent with the Dayton Accords and other obligations of members of the international community pursuant to international law.

¹³⁸ Such action would violate, e.g., Article 2 of the UN Charter and general principles of international law as evidenced, *inter alia*, by General Assembly Resolution No. 2625 Annex of October 24, 1970.

Annex 10 - Agreement on Civilian Implementation

The Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia, the Federation of Bosnia and Herzegovina, and the Republika Srpska (the "Parties") have agreed as follows:

Article I: High Representative

The Parties agree that the implementation of the civilian aspects of the peace settlement will entail a wide range of activities including continuation of the humanitarian aid effort for as long as necessary; rehabilitation of infrastructure and economic reconstruction; the establishment of political and constitutional institutions in Bosnia and Herzegovina; promotion of respect for human rights and the return of displaced persons and refugees; and the holding of free and fair elections according to the timetable in Annex 3 to the General Framework Agreement. A considerable number of international organizations and agencies will be called upon to assist.

In view of the complexities facing them, the Parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution, the tasks set out below.

Article II: Mandate and Methods of Coordination and Liaison

The High Representative shall:

- a. Monitor the implementation of the peace settlement;
- b. Maintain close contact with the Parties to promote their full compliance with all civilian aspects of the peace settlement and a high level of cooperation between them and the organizations and agencies participating in those aspects.
- c. Coordinate the activities of the civilian organizations and agencies in Bosnia and Herzegovina to ensure the efficient implementation of the civilian aspects of the peace settlement. The High Representative shall respect their autonomy within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement. The civilian organizations and agencies are requested to assist the High Representative in the execution of his or her responsibilities by providing all information relevant to their operations in Bosnia-Herzegovina.
- d. Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation.

- e. Participate in meetings of donor organizations, particularly on issues of rehabilitation and reconstruction.
- f. Report periodically on progress in implementation of the peace agreement concerning the tasks set forth in this Agreement to the United Nations, European Union, United States, Russian Federation, and other interested governments, parties, and organizations.
- g. Provide guidance to, and receive reports from, the Commissioner of the International Police Task Force established in Annex 11 to the General Framework Agreement.

In pursuit of his or her mandate, the High Representative shall convene and chair a commission (the "Joint Civilian Commission") in Bosnia and Herzegovina. It will comprise senior political representatives of the Parties, the IFOR Commander or his representative, and representatives of those civilian organizations and agencies the High Representative deems necessary.

The High Representative shall, as necessary, establish subordinate Joint Civilian Commissions at local levels in Bosnia and Herzegovina.

A Joint Consultative Committee will meet from time to time or as agreed between the High Representative and the IFOR Commander.

The High Representative or his designated representative shall remain in close contact with the IFOR Commander or his designated representatives and establish appropriate liaison arrangements with the IFOR Commander to facilitate the discharge of their respective responsibilities.

The High Representative shall exchange information and maintain liaison on a regular basis with IFOR, as agreed with the IFOR Commander, and through the commissions described in this Article.

The High Representative shall attend or be represented at meetings of the Joint Military Commission and offer advice particularly on matters of a political-military nature. Representatives of the High Representative will also attend subordinate commissions of the Joint Military Commission as set out in Article VIII(8) of Annex 1A to the General Framework Agreement.

The High Representative may also establish other civilian commissions within or outside Bosnia and Herzegovina to facilitate the execution of his or her mandate. The High Representative shall have no authority over the IFOR and shall not in any way interfere in the conduct of military operations or the IFOR chain of command.

Article III: Staffing

The High Representative shall appoint staff, as he or she deems necessary, to provide assistance in carrying out the tasks herein.

The Parties shall facilitate the operations of the High Representative in Bosnia and Herzegovina, including by the provision of appropriate assistance as requested with regard to transportation,

subsistence, accommodations, communications, and other facilities at rates equivalent to those provided for the IFOR under applicable agreements.

The High Representative shall enjoy, under the laws of Bosnia and Herzegovina, such legal capacity as may be necessary for the exercise of his or her functions, including the capacity to contract and to acquire and dispose of real and personal property.

Privileges and immunities shall be accorded as follows:

- a. The Parties shall accord the office of the High Representative and its premises, archives, and other property the same privileges and immunities as are enjoyed by a diplomatic mission and its premises, archives, and other property under the Vienna Convention on Diplomatic Relations.
- b. The Parties shall accord the High Representative and professional members of his or her staff and their families the same privileges and immunities as are enjoyed by diplomatic agents and their families under the Vienna Convention on Diplomatic Relations.
- c. The Parties shall accord other members of the High Representative staff and their families the same privileges and immunities as are enjoyed by members of the administrative and technical staff and their families under the Vienna Convention on Diplomatic Relations.

Article IV: Cooperation

The Parties shall fully cooperate with the High Representative and his or her staff, as well as with the international organizations and agencies as provided for in Article IX of the General Framework Agreement.

Article V: Final Authority to Interpret

The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement.

Article VI: Entry into Force

This Agreement shall enter into force upon signature.

For the Republic of Bosnia and Herzegovina

For the Republic of Croatia

For the Federal Republic of Yugoslavia

For the Federation of Bosnia and Herzegovina

UNOFFICIAL COPY

For the Republika Srpska

**THIRD REPORT OF REPUBLIKA SRPSKA TO THE SECURITY COUNCIL ON THE
SITUATION IN BOSNIA AND HERZEGOVINA**

May 2010

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THIRD REPORT OF REPUBLIKA SRPSKA TO THE SECURITY COUNCIL ON THE SITUATION IN BOSNIA AND HERZEGOVINA

I. Introduction

1. The Government of Republika Srpska (“Government”) respectfully submits its Third Report to the United Nations Security Council in anticipation of the Council’s upcoming deliberations on Bosnia and Herzegovina (“BiH”), scheduled for May 24, 2010. The Government submits this Report to assist the Security Council in assessing the current situation in BiH and determining how the international community can best support BiH in its continued progress, while fully respecting its sovereignty, the human and political rights of its citizens, and other fundamental principles of international law and democracy. As a treaty party to the agreements comprising the Dayton Peace Accords and as one of the two Entities comprising BiH under its Constitution, these issues are of special importance to the Government, as the Government continues in its commitment to adhere to its duties under these instruments and to protect the rights of its citizens set forth therein.

2. Since the Second Report was submitted to the Security Council and the Council’s last deliberations held in November 2009, the High Representative has continued to take unlawful actions that seriously interfere with BiH’s internal affairs and undermine the rule of law – despite the Government’s urging for an end to such practices. The Government has responded responsibly to such actions in accordance with its legal rights and obligations. This includes announcing a referendum to be held to seek the views of its citizens with respect to such longstanding and continued practices of the High Representative. These issues are discussed in Section II of the Report below. The Government has also provided three Appendices to this Report relevant to these issues. Appendix 1 is Annex 10 of the Dayton Accords, which defines the High Representative’s authority. Appendix 2 is a position paper of the Government regarding the High Representative’s decrees of December 14, 2009. And Appendix 3 is a position paper of the Government regarding its plans for a referendum.

3. These issues underscore the importance of the prompt closure of the Office of the High Representative (“OHR”), the support for which has been expressed among Peace Implementation Council (“PIC”) members, EU officials and other international experts. Unfortunately, the PIC’s 5-plus-2 agenda for its support of closure is now defunct because the leading Bosniak parties have no interest in seeing the OHR closed and thus are unwilling to work to achieve the remaining conditions. This should not be permitted to hold hostage OHR’s closure. These issues are also addressed in Section II.

4. The Government’s continued commitment to Euro-Atlantic integration is discussed in Section III. Also discussed in this section is the Government’s objection to the attempt to delay visa liberalization for political reasons despite the technical requirements having been met.

5. In Section IV, constitutional reform is addressed. The Government reiterates its support for urgent election eligibility reform to ensure that the BiH Constitution complies with the European Charter on Human Rights. The Government also explains how the major Bosniak

parties, with the support of some within the international community, have attempted to exploit the need for these amendments to impose sweeping changes to the Constitution. This effort has prevented the straightforward election eligibility amendments from being implemented. In addition, the Government describes its general position on constitutional reform, namely, how any constitutional reform must: arise from a consensus within BiH rather than being imposed from abroad; preserve the fundamental protections of the Dayton Accords; and not be linked to OHR closure.

6. Finally, in Section V, the Government repeats its call for Chapter VII measures to end. There is no legal or factual basis for their continuation, as the Government describes in this section.

II. Human Rights, Democracy, and State Sovereignty

A. The High Representative Has Continued to Issue Unlawful Decrees that Interfere with BiH's Internal Affairs and Undermine the Rule of Law

7. In its Second Report to the Security Council in November, the Government described how the current High Representative, in his short tenure, had unlawfully used the so-called "Bonn Powers" to issue decrees that were fundamentally destabilizing and disruptive to the consensus-building and reform efforts of BiH's own authorities. The High Representative, for example, issued a decree purporting to repeal a set of conclusions by the RS National Assembly calling for a discussion about competencies with other governmental bodies in BiH. Shortly thereafter, the High Representative by decree removed and banned two officials from public positions with no notice or hearing, no administrative or judicial process, and no opportunity to appeal. Also, in a two-day period in September, the High Representative (and Principal Deputy High Representative as Brčko Supervisor) issued no fewer than 9 peremptory decrees purporting to impose and change important laws in BiH.

8. Despite the Government's urging for an end to the High Representative's unlawful actions in the Second Report, the High Representative has continued to issue unlawful decrees that far exceed the terms of his mandate and violate the rights of BiH citizens. Security Council support for these actions would be inconsistent with Article 2(7) of the UN Charter, which provides that the UN is not authorized "to intervene in matters which are essentially within the domestic jurisdiction of any state"

9. On December 14, 2009, the High Representative issued decrees claiming to overrule the legitimate decision of the democratically elected BiH Parliamentary Assembly by seeking to impose foreign judges and prosecutors on BiH. The RS Government and National Assembly have rejected this decree as in violation of the Dayton Accords, the BiH Constitution, and other treaties to which BiH is a party. The responses of the Government and the Republika Srpska National Assembly ("RSNA") to the December 14 decrees are not only consistent with – but required by – law, including the Dayton Accords. Attached as Appendix 2 is a statement explaining the Government's response in greater detail.

1. The BiH Parliamentary Assembly's Sound Decision on Foreign Judges and Prosecutors

10. Under the existing BiH laws on the State Court and Prosecutor's Office, foreigners were allowed to work as judges and prosecutors in the BiH Court and Prosecutor's Office during a five-year "transitional period" ending December 15, 2009.¹ On October 1, 2009, the BiH Parliamentary Assembly took up the issue of whether to extend their mandate and, after careful deliberation, voted to reject amending the law to allow foreigners to continue to fill these BiH offices.

11. The Parliamentary Assembly acted with good reason. Appointment of foreign judges and prosecutors in the BiH State Court originated through earlier, highly controversially imposed decrees of the High Representative. The High Representative's "law" established that these foreign judges and prosecutors were free from the accountability properly imposed on BiH citizens who serve in the same positions. Foreign judges and prosecutors were granted immunity from criminal and civil liability at the same level as foreign diplomats. Unlike diplomats, foreign judges and prosecutors have tremendous authority over BiH citizens – authority to arrest, prosecute and incarcerate them. Granting foreign judges and prosecutors the immunity accorded diplomats – exempting them from accountability to which judges and prosecutors are normally subject – is thus an affront to the rule of law.

12. Not surprisingly, this arrangement has allowed the High Representative to politicize the BiH criminal justice system. The elected Parliamentary Assembly rightly determined not to extend the mandate of foreign judges and prosecutors; this decision was consistent with the need to restore judicial independence from political influence and to protect the rule of law.

2. The High Representative's Unlawful Defiance of the Parliamentary Assembly

13. The High Representative manifestly lacked the legal authority to issue the December 14, 2009 decrees overruling the Parliamentary Assembly's decision. The High Representative's legal mandate is established by Annex 10 of the Dayton Accords. Annex 10 gives the High Representative powers such as to "facilitate," "mobilize," and "coordinate." Annex 10 – even in the most creative interpretation – does not grant the sweeping powers the High Representative has asserted, including in his recent attempt to overrule the constitutionally protected decision of the BiH Parliamentary Assembly. Nor does Annex 10 give the High Representative the power to violate the Dayton Accords, other elements of international law or the Constitution of BiH. As a matter of law, where decisions of the High Representative are incompatible with applicable law, they are not valid or enforceable.

14. The Government invites all observers to read Annex 10 and ask themselves which provisions empower the High Representative by decree to enact and repeal laws, transfer competencies protected in the Constitution, or to punish individuals without a hearing or

¹ Law on Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina (29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07), Art. 65(1); Law on the Prosecutor's Office of Bosnia and Herzegovina (24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04), Art. 18(a)(1).

opportunity to appeal.² The High Representative's use of peremptory powers – the so-called “Bonn powers” – has been condemned by, *inter alia*, the Council of Europe's Parliament³ and Venice Commission⁴ as violating the European Convention on Human Rights.

15. Moreover, Annex 10 must be read in the context of the rest of the Dayton Accords. Any reading of Annex 10 that would give the High Representative powers to enact or overrule legally enacted legislation, transfer constitutionally established competencies, appoint judges and prosecutors, or remove and ban officials without due process is wholly inconsistent with Annex 4 (the BiH Constitution) and Annex 6 (Human, Civil and Political Rights Guarantees). There is no other source of authority other than Annex 10 for the High Representative's authority. Because Republika Srpska is a party to Annex 10, in which the High Representative's mandate is set forth, Republika Srpska has the right and obligation to assess the High Representative's activities and indicate when such activities exceed his authority mandated by international agreement.

3. Legal Obligations of the Government

16. The Government must conduct its affairs in accordance with the rule of law, which requires that it not accept or enforce the High Representative's December 14, 2009, decisions. This is required by applicable international law and domestic law, including the BiH and Republika Srpska constitutions (which also mandate governance by democratically elected officials). The Government's responsibility to cooperate with the High Representative in connection with peace implementation does not supersede the Government's obligations under domestic and international law. When a decision of the High Representative conflicts with the Government's duties under the constitutions of BiH and Republika Srpska or its obligations under international law, the constitutional and legal obligations of BiH and Republika Srpska law must have priority. For these reasons, the Government cannot accept as legally valid or implement decisions and orders of the High Representative – including the decisions of December 14, 2009 – which are inconsistent with BiH, Entity and international law.

4. Croats Also Condemn High Representative's Decisions

17. The Republika Srpska is not the only segment of BiH society that opposes the High Representative's December 14, 2009, decisions. The leading Croat political party, the HDZ BiH, also condemned them. The party issued a statement, which *inter alia* provides:

To make ourselves clear, HDZ BiH absolutely does not support this decision and we see it as the product of an unprincipled approach by the international community to the way that should be provided for the transition of BiH into the EU. The proper way is

² A copy of Annex 10 is attached as Appendix 1.

³ *See, e.g.*, Council of Europe Res. 1384 (2004).

⁴ *See, e.g.*, Venice Commission, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (1995).

for all activities in BiH to be assumed by the citizens of BiH, including the courts in BiH.

With this decision, international representatives have sent a clear message: BiH will not become a member of the EU soon, nor will become a candidate for accession to the EU, a status which all neighboring countries will obtain next year.

Therefore, we recommend to all PIC members that OHR be transformed to the EU Office and that BiH be freed from the protectorate.⁵

5. Full Cooperation on War Crimes Continues

18. In a press release on December 29, 2009, the High Representative suggested that actions by the Government and the RSNA, in response to the High Representative's decision of December 14, are inconsistent with their obligations under the Dayton Accords to "cooperate in the investigation and prosecution of war crimes." This is absolutely false. Nothing in the Dayton Accords requires or suggests that foreign judges and prosecutors must be used in the domestic prosecution of war crimes suspects. The European Commission's most recent Progress Report on Bosnia and Herzegovina, dated October 14, 2009, stated that BiH "cooperation with ICTY has remained good." The Government will continue to act according to law, including by continuing to cooperate fully with the ICTY.

B. The High Representative's Unlawful Interference with BiH Elections

19. The High Representative, despite the nearly unlimited powers he claims, is not accountable to the BiH electorate or anyone else. Yet in the past several months, as BiH's October elections draw closer, the High Representative has been campaigning almost as if he were a candidate.

20. Article 1.2 of the BiH Constitution provides that BiH "shall be a democratic state, which shall operate under the rule of law and with free and democratic elections." Annex 10 of the Dayton Accords, which defines the High Representative's powers, does not empower it to tell the electorate which parties to vote for or against.

21. Belying his claim that he "would not want to interfere with the election campaign,"⁶ the High Representative has in recent months pursued a vigorous campaign against certain parties in the BiH and Entity governments.

22. For example, in a February 20 speech, the High Representative said the agenda for security and prosperity in BiH "has been brought to a complete standstill by the leaders of

⁵ Press Release of the Croatian Democratic Union of Bosnia and Herzegovina, available at www.hdzbih.org/hr/vijesti/clanak/priopcenje-za-javnost-hrvatske-demokratske-zajednice-hdz-bih.

⁶ *Interview with HR/EUSR Valentin Inzko*, OSLOBODJENJE, Feb. 18, 2010.

Bosnia and Herzegovina.”⁷ He said the parties have “so far failed either by design or default. We can argue about their calculations and preoccupations – what is not in dispute is the fact that they have failed.”⁸ The High Representative continued, “As High Representative and EU Special Representative I am supporting the change that this country needs. . . . The question now is this: Will the people of Bosnia and Herzegovina make this change happen? Because it is in their power to do that.”⁹

23. On February 25, the High Representative implored his audience:

I hope, and I often repeat this, that you will use your Bonn powers at the election on 3 October and change the situation, elect new people, make use of the open lists, etc. in order to bring about change and I hope that you will look at the results achieved by the ruling coalition with a critical eye.¹⁰

24. The October elections in BiH are internal affairs of a sovereign state and Entities of a sovereign state. The High Representative’s meddling in the election campaign, including his frequent speechifying and other activities against certain political parties, is an intrusion into the domestic affairs of the BiH and its Entities and a violation of international law. The Government would not expect the Security Council to support any of these actions, which would be contrary to Article 2(7) of the UN Charter.

C. Legal Redress for Individuals Summarily Punished by the High Representative

25. The Government continues to seek a peaceful and legal remedy on behalf of the citizens whose human rights have been violated by the High Representative. As discussed in the Government’s Second Report, the High Representative has summarily removed nearly 200 BiH citizens from their positions, usually banning them indefinitely from holding any public employment, seized citizens’ travel documents, and otherwise violated citizens’ political and human rights. The High Representative has given these individuals no notice or hearing, no administrative or judicial process, and no opportunity to appeal. Last year, for example, the High Representative by decree removed and banned two police officials.¹¹ According to a recent report by the International Crisis Group, “Senior EC and European Union Police Mission (EUPM) officials told Crisis Group the removals of the police officials were unnecessary and based on thin evidence.”

26. In a unanimous decision in 2007, the BiH Constitutional Court held that the absence of a legal remedy to challenge such decrees violates Article 13 of the European Convention on

⁷ Speech by the High Representative and EU Special Representative, Valentin Inzko, Feb. 20, 2010.

⁸ *Id.*

⁹ *Id.*

¹⁰ Remarks by High Representative and EU Special Representative Valentin Inzko at a Press Conference to mark the conclusion of the PIC Steering Board Meeting, Feb. 25, 2010.

¹¹ International Crisis Group, *Bosnia’s Dual Crisis*, Nov. 12, 2009 (“ICG Report”), fn 67.

Human Rights (“ECHR”).¹² In response, however, the High Representative nullified the Constitutional Court’s decision¹³ in defiance of the BiH Constitution’s command that “[d]ecisions of the Constitutional Court shall be final and binding.”¹⁴ The High Representative further decreed that “any proceeding instituted before any court in [BiH], which challenges or takes any issue in any way whatsoever with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent.”¹⁵ In effect, the High Representative declared itself to be wholly above the rule of law and squelched all possibilities for legal recourse of citizens of BiH within their own courts and institutions.

27. In October, the Government wrote to Swedish Foreign Minister Carl Bildt, in Sweden’s capacity as President of the EU, and Council of Europe Human Rights Commissioner Thomas Hammarberg and asked them to work to establish an independent international commission of respected legal experts to give individuals who have been removed from their positions a forum to seek redress. The Government’s request was consistent with similar calls from within the Council of Europe.¹⁶ The Government has not received a response. It is the Government’s duty to continue to work to secure legal recourse for citizens injured by the High Representative’s summary decrees.

D. Plans for a Referendum

28. Shortly after the High Representative used the “Bonn Powers” again, on December 14, 2009, as described above, the Government announced plans to hold a referendum soliciting voters’ views about the High Representative’s imposition of legislation on BiH by decree and other actions that violate the Dayton Accords, the rule of law, and human rights. The Government took this step in accordance with the conclusions of the RSNA, adopted on October

¹² Appeal of Milorad Bilbija et al, No. AP-953/05, Decision on Admissibility and Merits, published Feb. 2007.

¹³ Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05, March 23, 2007 (“Bilbija Nullification Order”).

¹⁴ Constitution of Bosnia and Herzegovina, Dayton Accords Annex 4 (“BiH Constitution”), art. VI(4).

¹⁵ Bilbija Nullification Order.

¹⁶ For example, the Venice Commission, in a 2005 Opinion, wrote of the High Representative’s removal of individuals from office:

The continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable. As an urgent step the Commission recommends setting up an independent panel of legal experts which would have to give its consent to any such decision of the High Representative. Having regard to the confidential nature of many elements of the file, this might be a body composed of international experts.

Venice Commission, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (1995), para. 98.

1, 2009, which provided that the RSNA should call for a referendum in the event that the High Representative continued to attempt to impose legislation through the use of the Bonn Powers.

29. The High Representative has asserted that the use of referenda to seek citizens' views toward the High Representative's actions would be a violation of the Dayton Accords. There is no legal basis whatever for such a position.

30. Referenda are widely used by governments across Europe and the world as a mechanism for insuring democratic rule. No provision in the Dayton Accords prohibits or restricts referenda. The Council of Europe has often praised the use of referenda, including by sub-state governments. The Council's Parliamentary Assembly declared in a 2007 resolution, "Referendums are an instrument of direct democracy which belong to the European electoral heritage."¹⁷ And the Council's Congress of Local and Regional Authorities recognized in a 2007 resolution that "referendums, *whether at national, local or regional level*, constitute one of the main instruments of direct democracy giving citizens the possibility to take part in political decision making as well as in public matters which directly concern them"¹⁸ It is all the more important for Republika Srpska's citizens to be heard in a country in which a single, unelected foreign official claims extraordinary peremptory powers free from any review or limits. Attached as Appendix 3 is a paper explaining the Government's position in greater detail.

E. OHR Closure

31. As the Government explained in its Second Report, it is long past time for the High Representative to end. Many in the international community, such as former High Representative Carl Bildt,¹⁹ have called for the OHR's closure, and international calls to end the High Representative are growing. As the International Crisis Group wrote in a recent report:

The OHR has become more a part of Bosnia's political disputes than a facilitator of solutions, and the High Representative's executive (Bonn) powers are no longer effective. The OHR is now a non-democratic dispute resolution mechanism, and that dispute resolution role should now pass to Bosnia's domestic institutions with the temporary and non-executive assistance of the EUSR.²⁰

* * *

¹⁷ Council of Europe, Parliamentary Assembly Res. 1592 (2007), Nov. 23, 2007, para. 1.

¹⁸ Council of Europe, Congress of Local and Regional Authorities Res. 235 (2007) (emphasis added).

¹⁹ Asked in a June 2009 interview whether it is time to close OHR, Bildt replied, "Yes. I believe that it is time to give far more responsibility to the BiH politicians." *Office of the High Representative Should be Closed*, NEZAVISNE NOVINE, 11 June 2009. See also *Diplomats Gather from East and West on Bosnia*, BALKAN INSIGHT, 6 Nov. 2009 (quoting Russian Foreign Minister Sergei Lavrov as saying that Russia would "invest its utmost efforts" to promote OHR's prompt closure).

²⁰ ICG Report, p. 1.

The conflict over the future of the OHR should end now; the office should close . . . BiH cannot work in its present form, keeping the OHR open will not push its citizens toward reform and may sow enough discord to push reform out of reach.²¹

32. Continued OHR actions such as those cited above are direct violations of BiH sovereignty and of BiH rights under the UN Charter. The EU has recognized this in making it clear that BiH is unable to apply for EU membership as long as the OHR operates.²² The OHR's presence, as explained in the Second Report to the Security Council, frustrates the normal democratic process of negotiation of differences among BiH's Constituent Peoples and political parties. Moreover, as examined elsewhere in this report, the OHR frequently violates BiH citizens' human rights and the rule of law. For all of these reasons – among others – the OHR must close.

33. Until such time as the High Representative ends, the OHR's claimed peremptory powers must be terminated. After more than 14 years of peace and stability in BiH, direct intervention in government administration and law-making by the High Representative and the PIC should end. Building internal consensus through the hard work of bargaining and compromise among leaders elected by BiH citizens is the path to long-term stability.

34. Unfortunately, under the PIC's formula of five objectives and two conditions for supporting the end of the High Representative's mission, the OHR's closure is impossible. Although a formula such as 5-plus-2 could work if all parties in BiH wanted the OHR to close, this is not the case. The major Bosniak parties ardently want the OHR to remain open because they believe that the OHR, through its coercive powers, will assist them in achieving their objectives, including sweeping reform of the BiH Constitution to replace the Dayton federal system with a centralized state.

35. A prominent member of the Party for Bosnia and Herzegovina, which is led by Haris Silajdžić, the Bosniak member of the BiH Presidency, has even sought to suppress the Government's expression of its views on the OHR to the Security Council. In November, Beriz Belkic, Deputy Chairman of the BiH House of Representatives, brought a case asking the BiH Constitutional Court to declare the Government's Second Report to the Security Council unconstitutional. On March 27, 2010, the Constitutional Court confirmed that the Government has the right under the BiH Constitution to report to the Security Council on the situation in BiH and that its past reporting to the Security Council was consistent with the Constitution.²³ The

²¹ ICG Report, p. 16.

²² On September 29, 2009, a representative of the EU Presidency testified to the US Helsinki Commission that "[a]s long as OHR remains in place, a Bosnian EU membership application cannot be considered." Address of Bjorn Lyrvall, Director General for Political Affairs, Ministry for Foreign Affairs of Sweden/Presidency of the EU to the U.S. Helsinki Commission, Sept. 29, 2009, at 8.

²³ Constitutional Court of Bosnia and Herzegovina, 60th Plenary Session, 27 March 2010, available at www.ccbh.ba/eng/press/index.php?pid=4243&sta=3&pkat=506. The full written opinion in the case is pending.

Court dismissed Mr. Belkić's request as "ill-founded."²⁴ The Government is gratified that the Constitutional Court rejected Mr. Belkić's attempt to silence the Government's expression of its views. But this case helps illustrate the extent to which the Bosniak parties will go to suppress arguments for OHR closure.

36. So long as the OHR continues to intervene in domestic dialogue and threatens to impose by decree one party's views on the state, the Bosniak parties will not negotiate to achieve the remaining objectives and conditions in the 5-plus-2 formula.

37. For example, on the crucial issue of state property, authorities in BiH have made no recent progress. The reason is simple: for a negotiation to have any prospect of success, all sides must want a resolution. In its Second Report to the Security Council, the Government explained how the largest Bosniak party, the SDA, last year walked away from a PIC-supported resolution of the state property issue reached at Prud in November 2008. Inexplicably, the OHR supported the SDA's abrogation of this key agreement.

38. The Government, which believes the OHR's closure is long overdue, remains eager to reach agreement on all outstanding issues preventing it, including the apportionment of state property. Unfortunately, the main Bosniak parties do not want such an agreement because they want the OHR to remain in place.

39. This problem has been recognized by third-party experts. For example, in a recent report on BiH, the International Crisis Group raised this concern, no less than three times:

The Bosniak parties, especially the SBiH and the SDP, who consider the OHR their main negotiating leverage, will not agree to complete the objectives required for closure until there is a deal on constitutional reform.²⁵

Bosniak parties will not agree to a state property proposal until RS agrees to constitutional reform . . . [R]esolution of the state property issue is elusive not because the problem is inherently hard but because the PIC has linked it to Bosnia's most controversial issue, the fate of the OHR.²⁶

40. The international community must not allow such actions to continue holding hostage the closure of the OHR.

III. Euro-Atlantic Integration

41. The Government continues to support BiH's campaign for membership in the European Union and NATO. The Government is committed to working cooperatively with the European Union as BiH continues on the path of EU integration.

²⁴ *Id.*

²⁵ ICG Report, pp. 5-6.

²⁶ ICG Report, p. 10. *See also* fn 17.

42. The Government is disappointed, however, that the European Union has delayed – apparently for political reasons – its decision on visa liberalization for BiH citizens despite BiH’s success in meeting the remaining requirements for visa-free travel.

43. In a February 25, 2010, communiqué, the Steering Board of the PIC welcomed the “recent progress made by BiH authorities to fulfill the requirements for EU visa liberalisation.”²⁷ Even the High Representative has acknowledged BiH authorities’ quick recent progress in meeting the requirements for visa-free travel to the European Union. In an April 28, 2010, press release, the OHR wrote, “Highlighting the successful adoption of 174 requirements related to visa liberalisation in recent months, the HR/EUSR said that this proves that Bosnia and Herzegovina can actually make progress.”²⁸

44. In the past, the European Commission’s decisions on when to offer states visa-free travel have been based on a technical assessment of those states’ implementation of the necessary benchmarks established by the Commission. The Commission’s decision to delay visa liberalization for BiH, in contrast, appears to be driven by political factors. Last month, Jelko Kacin, the vice-president of the European Parliament’s delegation for the Balkans, said that visa-free travel to the European Union would not begin until December and added that “it is very unlikely that the current authorities in BiH will be able to say that they’ve abolished the visas.”²⁹ Certain non-governmental organizations, headed by Transparency International BiH, have also joined this negative campaign aimed at preventing visa liberalization from occurring soon. This suggests not only political motives but an effort to intervene in BiH elections. The Government is pleased that authorities in BiH have fulfilled the conditions for visa-free travel and regrets that visa liberalization is being delayed for reasons unrelated to the merits.

IV. Constitutional Change

A. Republika Srpska Supports Urgent Election Eligibility Reform of Constitution

45. The Government strongly supports amending provisions of the BiH Constitution on eligibility for election to the BiH Presidency and House of Peoples to bring the Constitution into conformity with the ECHR. The Government has held this view for some time and last year made a proposal to remedy the situation. Since then, the decision of the European Court of Human Rights in the *Case of Sejdic and Finci v. BiH* has highlighted the pressing need for this reform.

46. Unfortunately, the Government’s proposals to quickly resolve this issue by amending the election eligibility provisions of the BiH constitution have not been reciprocated by the main Bosniak parties. Instead of targeting the election eligibility issue, which can be resolved in short order, these parties have attempted to exploit the narrow issue to demand a sweeping, highly

²⁷ Communiqué of the Steering Board of the Peace Implementation Council, Feb. 25, 2010.

²⁸ OHR Press Release, If Progress is possible on Visa Liberalisation, then why not on Economic Reform?, April 28, 2010.

²⁹ Interview with Jelko Kacin, NEZAVISNE NOVINE, April 20, 2010.

controversial transformation of the BiH Constitution, which would cast aside the careful balance struck in the Dayton Accords and turn BiH into a centralized state.

47. Consequently, what should have been easily achievable constitutional amendments have not been enacted. The need for specific changes to the Constitution in response to the ECHR's decision should not be used as a pretext to push a far broader – and infinitely more controversial – constitutional transformation.

B. Any Constitutional Reforms Must Arise from a Consensus within BiH rather than being Imposed from Abroad

48. If BiH is to reform its Constitution, it must do so through a transparent, democratic and constitutional process that reflects the will of BiH's citizens. The Government rejects intervention by foreign actors to force BiH into transforming the Constitution it agreed to in the Dayton Accords.

49. Last October, certain members of the PIC Steering Board crafted sweeping changes to the BiH Constitution and insisted that BiH's political leaders accept them during closed-door meetings at Butmir. Nearly all of the several political leaders invited declined to endorse the demands. As discussed in the Government's Second Report, the 2009 talks at Butmir failed in part because they sought to impose constitutional changes while circumventing the transparent and legal process required under applicable law to change the Constitution.

50. Notwithstanding the failure of Butmir, foreign pressure for broad constitutional reform has continued. On January 26, 2010, for example, the Council of Europe's Parliamentary Assembly approved Resolution 1701, a text co-authored by the Parliamentary Assembly's new president, Mevlüt Çavuşoğlu of Turkey,³⁰ which is a well-known supporter of the Bosniak parties in BiH.³¹ Written soon after the decision in *Sejdić and Finci v. BiH*, the resolution falsely insinuates that compliance with the European Convention on Human Rights ("ECHR") requires "comprehensive" changes to the BiH Constitution.

51. The reality is that proposals for "comprehensive" changes to the BiH Constitution have nothing to do with the ECHR. The *Sejdić and Finci* decision concerns only the election eligibility provisions of the Constitution. Moreover, the Venice Commission has found that election eligibility provisions are the only element of the BiH Constitution that must be reformed in order to align it with the ECHR. The Venice Commission stated in a March 2005 Opinion

³⁰ See *Interview with Mevlüt Çavuşoğlu*, DNEVNI AVAZ, 28 Jan. 2010. There, Mr. Çavuşoğlu stated, "It is my opinion that B-H needs a completely new constitution."

³¹ See *Turkey Supports One Side in BiH*, GLAS SRPSKA, 5 May 2010, reporting on the comments of Hannes Swoboda, Vice President of the Socialist Group, the second largest party in the European Parliament: "Asked to clarify whether he sees the current role of Turkey as positive, Swoboda explained that at this point in time the role of Turkey is not constructive, because it supports only one side in BiH." See also *Some European Countries Are Concerned Over Turkish Influence in the Balkans*, VIJSTA.BA, 7 May 2010, quoting Franco Frattini, Italy's Minister of Foreign Affairs: "One should pay great attention to the activities and presence of Turkey in this [Balkans] region."

that aside from the election eligibility provisions, “[n]o other problems of compatibility of the BiH Constitution with the ECHR are apparent”³²

52. Reform of the Constitution requires the development – through give and take – of a consensus among BiH’s citizens, through the efforts of its elected leaders and political parties, just as in any democracy. The PIC Steering Board recognized this in a November 19, 2009, communiqué in which it urged constitutional reform “on the basis of the required political consensus.”

53. Even Lord Ashdown, as High Representative, recognized this principle, stating to the Venice Commission:

It has consistently been the view of Peace Implementation Council and successive High Representatives, including me, that, provided the Parties observe Dayton . . . then the Constitution of Bosnia and Herzegovina should be changed only by the prescribed procedures by the Parliamentary Assembly of Bosnia and Herzegovina and not by the International Community. In other words, that, provided Dayton is observed, the powers of the High Representative begin and end with the Dayton texts, and that any alteration to the Constitution enshrined therein is a matter for the people of Bosnia and Herzegovina and their elected representatives to consider.”³³

C. Any Constitutional Reforms Must Preserve the Fundamental Protections of the Dayton Accords

54. Any constitutional reforms must leave intact the federal structure and mechanisms that are the essential centerpiece of the Dayton Accords. These protections, which safeguard the vital interests of all the Constituent Peoples of BiH, established peace and make BiH a viable state today. Such protections provided by a federal system of government are far from unique to BiH. Federal structures in other democracies in Europe and elsewhere have been successful forms of governance for states that consist of diverse peoples.³⁴

55. The Government recognizes the need for BiH state to become more efficient and functional. The Government emphatically rejects, however, the notion that these attributes require a unitary state. Many decentralized, federal states are highly efficient and functional. Constitutional reform in the name of “efficiency” and “functionality” must not be a cover for restructuring the Constitution to create a unitary state.

D. Constitutional Changes Must Not be Linked in Any Way to OHR Closure

³² European Commission For Democracy Through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, adopted by the Venice Commission at its 62nd plenary session, para. 66 (Venice, 11-12 March 2005).

³³ See Session Report from the 60th Plenary Session of the Venice Commission, CDL-PV(2004)003 of 3 November 2004, p. 18.

³⁴ Examples include Germany, Spain, Belgium, Switzerland, and Canada, among many others.

56. Despite the PIC's repeated statements that constitutional reform is not a requirement for ending the High Representative's mission,³⁵ the High Representative and others continue to try to link sweeping changes to the BiH Constitution with OHR closure. In a speech last month, for example, the High Representative said, "Even though constitutional reform is not *formally* linked to the continuation of the presence of the international community, there are of course practical implications – because constitutional reform could resolve the problems that were the reason the OHR was given its executive mandate in the first place."³⁶ The High Representative went on to outline his vision for a new BiH Constitution that scraps the Dayton protections and concentrates power in Sarajevo.³⁷

57. In addition, as explained in section II(E), above, the major Bosniak parties continue to rebuff the Government's efforts to compromise on the remaining goals in the PIC's 5-plus-2 formula because they want the High Representative to stay and impose their preferences on other parties and Constituent Peoples by decree.

58. As the Government explained in its Second Report, constitutional reform should generally follow the sequence set out by the PIC Steering Board in June 2009 and the Presidency of the EU in October 2009. According to this sequence, constitutional reform, which the EU has stated is *not* required for application for EU membership, should be taken up after OHR closure, which the EU has stated *is* required for application for EU membership.

V. No Factual Basis for Continuing Chapter VII

59. As the Government explained in its Second Report to the Security Council, the situation in BiH does not warrant the Security Council to continue to act under Chapter VII of the UN Charter. The facts fail to support a determination that the situation in BiH constitutes a threat to international peace and security.

60. BiH has been at peace for more than 14 years and has enjoyed remarkable stability since the Dayton Accords. Today, the security situation in BiH today remains peaceful and stable – as it has been since soon after the Accords were signed – and there is no realistic threat of a resumption of hostilities. The twenty-first report to the Security Council on the activities of EUFOR observes, "The overall security situation in BiH remained calm and stable throughout the reporting period. Although nationalistic rhetoric continued, it had no impact on the safe and secure environment."³⁸ The EUFOR report also says that the "security situation is expected to remain stable despite prospects of continuing political tension."³⁹ The longstanding and consistent military assessments that the security situation in BiH is calm and stable – and is

³⁵ See, e.g., Communiqué of the Steering Board of the Peace Implementation Council, Feb. 25, 2010.

³⁶ Speech by High Representative and EU Special Representative Valentin Inzko At a Conference on The Constitutional Order of Bosnia and Herzegovina: Its Functionality and European Perspectives Organized by the Konrad Adenauer Stiftung, April 27, 2010 (emphasis added).

³⁷ *Id.*

³⁸ Twenty-first Three-monthly Report on Operation ALTHEA to the United Nations Security Council ("21st Report") at para. 9.

³⁹ 21st Report at section IV.

expected to remain that way – thoroughly refute the notion that the situation in BiH threatens international peace and security.

61. As in past years, BiH, far from threatening stability, is contributing to international peace and security. On the first day of 2010, BiH began its first ever term as a member of the UN Security Council. In addition, NATO ministers last month agreed to grant BiH a Membership Action Plan.

62. BiH's stability is also reflected in its elections. BiH and its Entities and localities have held a long and uninterrupted succession of free and fair elections, which have been praised by international observers such as the Organization for Security and Cooperation in Europe ("OSCE"). For example, in its report on the 2002 general elections, OSCE said, "The conduct of the elections was largely in line with international standards for democratic elections, when considering the country's unique legal and constitutional framework. They mark important progress toward the consolidation of democracy and rule of law under domestic control."⁴⁰ OSCE wrote of the 2004 municipal elections, "The successful conduct of the elections marked a further step forward for BiH's democratic development."⁴¹ Regarding the most recent general elections, held in 2006, the OSCE wrote that "overall, the elections represented further progress in the consolidation of democracy and the rule of law."⁴²

63. In the Government's Second Report to the Security Council, submitted in November 2009, it explained that despite the High Representative's frustration of efforts to negotiate compromises among BiH's Constituent Peoples, BiH political leaders have made progress on a broad range of fronts.

64. Since November, that progress has continued, again in spite of the High Representative's interference. For example, as explained above, BiH has continued to advance quickly toward visa-free travel to the European Union. In addition, BiH authorities have, in recent months, taken the necessary steps to receive IMF and World Bank loans to help address the effects of the global economic crisis.

65. There is plainly no factual basis for the Security Council to continue invoking Chapter VII with respect to the situation in BiH.

VI. Conclusion

66. The Government urges the Security Council to carefully consider the issues set forth in this Report. More than 14 years after the return of peace and the conclusion of the Dayton Accords, the rule of law, respect for human rights, democratic governance and the sovereignty of BiH are consistently violated by the High Representative, supported by certain elements of the

⁴⁰ Bosnia and Herzegovina General Elections, Oct. 5, 2002, Final Report of OSCE/ODIHR Election Observation Mission, Jan. 9, 2003.

⁴¹ Bosnia and Herzegovina Municipal Elections, Oct. 2, 2004, Final Report of OSCE/ODIHR Election Observation Mission, Feb. 10, 2005.

⁴² Bosnia and Herzegovina General Elections, Oct. 1, 2006, Final Report of OSCE/ODIHR Election Observation Mission, Feb. 6, 2007.

international community. The Dayton Accords require democratic governance and respect for human rights and international law within BiH. The Security Council should be unequivocal in its commitment to these principles.

Appendix 1

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Annex 10 - Agreement on Civilian Implementation

The Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia, the Federation of Bosnia and Herzegovina, and the Republika Srpska (the "Parties") have agreed as follows:

Article I: High Representative

The Parties agree that the implementation of the civilian aspects of the peace settlement will entail a wide range of activities including continuation of the humanitarian aid effort for as long as necessary; rehabilitation of infrastructure and economic reconstruction; the establishment of political and constitutional institutions in Bosnia and Herzegovina; promotion of respect for human rights and the return of displaced persons and refugees; and the holding of free and fair elections according to the timetable in Annex 3 to the General Framework Agreement. A considerable number of international organizations and agencies will be called upon to assist.

In view of the complexities facing them, the Parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution, the tasks set out below.

Article II: Mandate and Methods of Coordination and Liaison

The High Representative shall:

- a. Monitor the implementation of the peace settlement;
- b. Maintain close contact with the Parties to promote their full compliance with all civilian aspects of the peace settlement and a high level of cooperation between them and the organizations and agencies participating in those aspects.
- c. Coordinate the activities of the civilian organizations and agencies in Bosnia and Herzegovina to ensure the efficient implementation of the civilian aspects of the peace settlement. The High Representative shall respect their autonomy within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement. The civilian organizations and agencies are requested to assist the High Representative in the execution of his or her responsibilities by providing all information relevant to their operations in Bosnia-Herzegovina.
- d. Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation.

Annex 10 – Agreement on Civilian Implementation

e. Participate in meetings of donor organizations, particularly on issues of rehabilitation and reconstruction.

f. Report periodically on progress in implementation of the peace agreement concerning the tasks set forth in this Agreement to the United Nations, European Union, United States, Russian Federation, and other interested governments, parties, and organizations.

g. Provide guidance to, and receive reports from, the Commissioner of the International Police Task Force established in Annex 11 to the General Framework Agreement.

In pursuit of his or her mandate, the High Representative shall convene and chair a commission (the "Joint Civilian Commission") in Bosnia and Herzegovina. It will comprise senior political representatives of the Parties, the IFOR Commander or his representative, and representatives of those civilian organizations and agencies the High Representative deems necessary.

The High Representative shall, as necessary, establish subordinate Joint Civilian Commissions at local levels in Bosnia and Herzegovina.

A Joint Consultative Committee will meet from time to time or as agreed between the High Representative and the IFOR Commander.

The High Representative or his designated representative shall remain in close contact with the IFOR Commander or his designated representatives and establish appropriate liaison arrangements with the IFOR Commander to facilitate the discharge of their respective responsibilities. The High Representative shall exchange information and maintain liaison on a regular basis with IFOR, as agreed with the IFOR Commander, and through the commissions described in this Article.

The High Representative shall attend or be represented at meetings of the Joint Military Commission and offer advice particularly on matters of a political-military nature. Representatives of the High Representative will also attend subordinate commissions of the Joint Military Commission as set out in Article VIII(8) of Annex 1A to the General Framework Agreement.

The High Representative may also establish other civilian commissions within or outside Bosnia and Herzegovina to facilitate the execution of his or her mandate. The High Representative shall have no authority over the IFOR and shall not in any way interfere in the conduct of military operations or the IFOR chain of command.

Article III: Staffing

The High Representative shall appoint staff, as he or she deems necessary, to provide assistance in carrying out the tasks herein.

The Parties shall facilitate the operations of the High Representative in Bosnia and Herzegovina, including by the provision of appropriate assistance as requested with regard to transportation,

Annex 10 – Agreement on Civilian Implementation

subsistence, accommodations, communications, and other facilities at rates equivalent to those provided for the IFOR under applicable agreements.

The High Representative shall enjoy, under the laws of Bosnia and Herzegovina, such legal capacity as may be necessary for the exercise of his or her functions, including the capacity to contract and to acquire and dispose of real and personal property.

Privileges and immunities shall be accorded as follows:

- a. The Parties shall accord the office of the High Representative and its premises, archives, and other property the same privileges and immunities as are enjoyed by a diplomatic mission and its premises, archives, and other property under the Vienna Convention on Diplomatic Relations.
- b. The Parties shall accord the High Representative and professional members of his or her staff and their families the same privileges and immunities as are enjoyed by diplomatic agents and their families under the Vienna Convention on Diplomatic Relations.
- c. The Parties shall accord other members of the High Representative staff and their families the same privileges and immunities as are enjoyed by members of the administrative and technical staff and their families under the Vienna Convention on Diplomatic Relations.

Article IV: Cooperation

The Parties shall fully cooperate with the High Representative and his or her staff, as well as with the international organizations and agencies as provided for in Article IX of the General Framework Agreement.

Article V: Final Authority to Interpret

The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement.

Article VI: Entry into Force

This Agreement shall enter into force upon signature.

For the Republic of Bosnia and Herzegovina

For the Republic of Croatia

For the Federal Republic of Yugoslavia

For the Federation of Bosnia and Herzegovina

For the Republika Srpska

Appendix 2

POSITION OF THE REPUBLIKA SRPSKA GOVERNMENT REGARDING THE HIGH REPRESENTATIVE'S DECISION OF 14 DECEMBER 2009

Republika Srpska Cannot Accept the High Representative's Unlawful Decisions and Hence Rejects Them Entirely

1. The Republika Srpska Government has a legal obligation not to accept or implement the High Representative's decisions, hence it rejects them entirely. The Government is bound by the law and constitution to conduct its affairs according to the rule of law. This is required by the domestic law of BiH, including the BiH and Republika Srpska Constitutions, and applicable international law. For this reason, the Government cannot accept as legally valid or implement decisions and orders of the High Representative that are inconsistent with BiH and Entity law and obligations of BiH pursuant to international law.¹
2. The Republika Srpska Government remains committed and continues to adhere to the legal pursuit and prosecution of all war crime cases.
3. The Court of Bosnia and Herzegovina and Prosecutor's Office of Bosnia and Herzegovina are foreign bodies in the judicial system of BiH, imposed by decisions of the High Representatives in contravention of the Constitution of BiH as provided in Annex 4 to the international agreement known as the Dayton Accords. The High Representative is an interpreter of only Annex 10 to the Dayton Accords and has no mandate to interpret Annex 4 – the BiH Constitution; in particular, he has no mandate to amend the BiH Constitution. Also, the BiH Constitutional Court has no mandate to amend the BiH Constitution but only to assess whether legislation issued by authorities conforms to the BiH Constitution. Because there is no mention of either the BiH Court or the BiH Prosecutor's Office in the Constitution, then any discussion about whether such imposed bodies are a constitutional category is illusory. For this reason, the decision on the constitutionality of BiH institutions was thus installed, where the Serb and Croat judges were outvoted by the three foreigners and two Bosniaks. With such a decision, the Constitutional Court joined in the High Representative's unlawful practice of imposing law. This is why the work of the BiH Court and BiH Prosecutor's Office constitutes an assault on law, which is corroborated by today's decisions of the High Representative.
4. It is in this context that the attempt to extend the mandate of foreign prosecutors and judges working in the BiH Prosecutor's Office and BiH Court, by the High Representative imposing the law, should be analyzed. The High Representative's decisions are an unlawful attempt to overrule by decree the legitimate determination reached by the democratically elected representatives of BiH's citizens through the prescribed legislative process.

¹ The rule of law obligation arises from the mutually consistent rule of law provisions of BiH and Republika Srpska constitutions and the Dayton Peace Accords. Governance according to the rule of law is also a general principle of law. See Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, RECUEIL DES COURS, 1957, vol. 92, issue II, at 38, 45-46, 92.

5. Pursuant to the imposed Law on Court of Bosnia and Herzegovina and the Law on the Prosecutor's Office of Bosnia and Herzegovina, foreigners were allowed to work as judges and prosecutors in the BiH Court and Prosecutor's Office, during a five-year "transitional period" ending in December 2009.² In October 2009, the BiH Parliamentary Assembly, pursuant to its constitutional authority and procedure, voted to reject amending the law to extend the transitional period of these foreign prosecutors and judges. For reasons set forth below, the elected representatives of BiH had sound policy reasons for not amending the law.
6. In addition to legal and constitutional provisions, the Government is further bound by the position of the Republika Srpska National Assembly as set forth in its Conclusions of 1 October 2009: "The RS National Assembly hereby expresses its full support to the position and conclusions expressed by the RS President and RS Prime Minister in their statements before the National Assembly at its 19th special session on the occasion of the Report on the legislation the High Representative to Bosnia and Herzegovina attempted to impose on 18 September 2009; specifically, in case the High Representative continues to seek to impose and enforce said legislation, the RS National Assembly shall consult the public. Should such circumstances occur, all RS representatives to the BiH joint institutions shall no longer take part in the work thereof as they cannot give their support to BiH being governed by unlawful OHR authority and those who support it."

Rejection of Continuing Foreign Judges and Prosecutors Is Sound Policy

7. The appointment of foreign personnel as officials in BiH's institutions is not consistent with a return to constitutional government and the rule of law. Under BiH's Constitution, except for three judges of the Constitutional Court, there are no provisions for foreigners to serve as officials in BiH's institutions.³ However, originating through decrees of the High Representative, the laws of BiH were imposed and changed to provide for foreigners to act as judges and prosecutors in BiH's Court and Prosecutor's Office.⁴ Over time, more and more foreigners were emplaced. By the end of 2009, for example, nearly half of the prosecutors in the section of the Prosecutor's Office for Organized Crime, Economic Crime and Corruption are foreigners, including the Deputy Prosecutor who heads that section.⁵ Most of these officials were originally appointed by decision of the High Representative.⁶
8. These foreign judges and prosecutors have been free from the accountability properly imposed on BiH citizens who serve in the same positions. They were granted immunity

² Law on Court of Bosnia and Herzegovina, "Official Gazette" of Bosnia and Herzegovina, (29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07), Art. 65(1). Law on the Prosecutor's Office of Bosnia and Herzegovina, (24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04), Art. 18(a)(1).

³ Constitution of Bosnia and Herzegovina, Art. VI.

⁴ The Government reserves its position regarding the legality and enforceability of these changes to the laws.

⁵ Information on prosecutors of Bosnia's Prosecutor's Office is available at www.tuzilastvobih.gov.ba.

⁶ *See id.*

from criminal and civil liability⁷ at the same level as diplomats under the Vienna Convention on Diplomatic Relations.⁸ Granting such immunity to judges and prosecutors is contrary to fundamental principles of the rule of law and democratic governance. Unlike diplomats, judges and prosecutors exercise considerable authority and discretion over citizens of BiH, including authority to apprehend, prosecute and incarcerate. Such authority and discretion in any jurisdiction can be abused if not checked by mechanisms of accountability. But there has been no accountability for foreign judges and prosecutors in BiH, which is another argument for terminating their work upon the expiration of their five-year mandate.

9. This arrangement with foreign prosecutors and judges has resulted in political manipulation of the criminal justice system in cases conducted before those institutions, be it because of their selective approach to war crimes or pursuit of elected officials--mainly Serbs and Croats. The decision issued by the Head of the War Crimes Department within the BiH Prosecutor's Office, David Schwendiman, at the very end of his mandate, to stop the investigation of war crimes committed against Serbs at the beginning of the war – the *Tuzla column* and *Bradina* case – is definitive proof that the unconstitutional judicial institutions at the level of BiH do not serve to enforce law and justice but to determine the character of the war by prosecuting and trying Serbs and Croats. Foreign judges and prosecutors in BiH have strong incentives to obey the OHR and other foreign officials who have been involved in setting their terms of work and compensation. Such criminal justice system abuses have been the subject of official inquiries.
10. When the issue of extending the mandate of foreigners was put before the BiH Parliamentary Assembly, after assessment and deliberation, the elected officials exercised their constitutional authority and voted against extending the mandate. Terminating the work of foreign prosecutors and judges was a first step towards restoring independence to the judiciary and constitutional and legal accountability of the judiciary to BiH citizens. A renewal of their mandate would have been a giant step back for the principle of constitutional government and the rule of law in BiH. Certainly, the attempt to do so through a decree of the High Representative in defiance of the Parliamentary Assembly is an affront to these principles.

Legal Obligations of the Government

11. Article I, paragraph 2 of the BiH Constitution requires that the Government be established on the basis of free and democratic elections and that it must conduct its affairs according to

⁷ The Government reserves its position regarding the legality and enforceability of the immunity in question with respect to non-citizens of Bosnia.

⁸ Decision on Granting a Diplomatic Status to the International Members of the Prosecutor's Office in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina (28/04). The Government reserves its position regarding the constitutionality of this decision. See also, Law on Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, (29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07), which provides criminal and civil immunity for international judges (Art. 65(8)), but no immunity for judges who are citizens of Bosnia. See also, Law on the Prosecutor's Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, (24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04), which provides criminal and civil immunity for international prosecutors (Art. 18(a)(3)), but no immunity for prosecutors who are citizens of Bosnia.

the rule of law. When the High Representative issues decisions and orders that violate provisions of BiH domestic and international law the Government must base its response to such decisions and orders upon the applicable law.⁹

12. In determining the applicable law, a sovereign state and its agencies and instrumentalities must first look to the constitution of the state and, in the case of Republika Srpska, the BiH Constitution and the Constitution of Republika Srpska. Next, the government must look to any applicable international obligations imposed upon BiH and/or the Entities by international law. Of first importance in this respect, are applicable treaties. Those most directly concerned with orders of the High Representative would be the Dayton Peace Accords and the human, political, and civil rights treaties specified in Annex 6 of the Dayton Peace Accords.
13. It is of considerable importance from a legal hierarchy standpoint to recognize that Article II of the BiH Constitution in paragraph 2 adopts as domestic law the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols ("European Convention"). Paragraph 2 states that these shall have priority over all other domestic law. Paragraph 3 enumerates other rights, including many of those incorporated in the European Convention. Paragraph 6 of Article II requires that all courts, agencies, governmental organs and instrumentalities operated by or within the Entities shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2.
14. Article III, paragraph 3(b) specifies that "The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities." Among such principles of particular relevance to the relations between the High Representative and the Government and BiH are: *pacta sunt servanda*; obligation of good faith in both performance and interpretation of a treaty; *ex injuria non oritur jus*; non-intervention in internal affairs,¹⁰ the latter particularly having been violated by the High Representative through his decisions.
15. Also of considerable importance to the proper interpretation of the Government's legal responsibilities and duties are paragraphs 2 and 3 of Article I of the BiH Constitution. These articles state:
 2. Democratic principles. Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free democratic elections.

⁹ Of course the High Representative is also bound by international law. See Fitzmaurice at 46 ("[I]nternational law is automatically, *ipso facto*, and permanently binding on international persons—and in particular, States.").

¹⁰ See Herman Mosher, *General Principles of Law*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 511, 511-527 (1992).

3. Composition. Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter “the Entities”).

16. Paragraph 2 requires that the Government operate according to the rule of law and mandates governance by democratically elected officials. Paragraph 3 recognizes the primacy of the two Entities--Republika Srpska and the Federation of Bosnia and Herzegovina--as units of government. These paragraphs establish that the Government’s legal obligations under the BiH Constitution cannot be subordinate to decisions and orders of a non-democratically elected foreign official, such as the High Representative, particularly when his orders do not conform to the rule of law, including international law.
17. The obligations of: democratic governance; primacy of human, civil and political rights treaties and constitutional provisions; and rule of law-based governance in the BiH Constitution have particular force among the legal obligations of the Republika Srpska Government because they are among the central principles and agreements included in the Dayton Peace Accords. The plain language of the Dayton Peace Accords and the inclusion of the above stated obligations in the BiH Constitution, which is Annex 4 of the Accords, give these obligations a foundational status among the international law obligations created by the Dayton Peace Accords. In the overall context of the Accords these obligations must be read to take precedence, in case of a conflict of obligations, over the obligation of cooperation with the party-appointed High Representative (Republika Srpska being one of the parties) provided for in Annex 10.
18. Moreover, it is a principle of treaty interpretation that the provisions of a treaty should be read in their context so as to be internally consistent insofar as possible and to be consistent with the treaty’s object and purpose. The circumstances of the treaty’s conclusion must also be taken into account.¹¹ It is inconceivable that the treaty parties would have agreed to give the High Representative the powers he seeks to exercise in the decisions at issue here. Actions of the High Representative inconsistent with the primary obligations of the Dayton Peace Accords are therefore per se in excess of the High Representative’s legal authority.
19. In addition, the Government must take account of Article III, paragraph 2(c) of the BiH Constitution which assigns wide responsibilities to the Government to protect the fundamental human, civil and political rights and fundamental freedoms of BiH citizens, guaranteed by Article II of the BiH Constitution, as described above.
20. Annex 10 of the Dayton Peace Accords, is the High Representative’s sole source of authority. Annex 10 does not give the High Representative anything resembling the sweeping powers that the High Representative asserts, such as the authority to enact, amend

¹¹ Vienna Convention on the Law of Treaties, arts. 31 and 32, 8 ILM 679 (1969); Competence of the ILO to Regulate Agricultural Labor, P.C.I.J. (1922) Series B, Nos. 2 and 3, p. 23 (“In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.”); Draft Articles on the Law of Treaties with Commentaries 1996, Yearbook of the International Law Commission, 1996, Vol. II pp 220-221; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, Second Edition, pp. 230-238 (2007).

and repeal laws, require and appoint foreign judges and prosecutors, or remove and ban officials from office. Instead, Annex 10 instructs the High Representative to, for example, “facilitate,” “mobilize,” and “coordinate.” In case there were any doubt, Annex 10 provides that the High Representative “shall respect [the] autonomy” of civilian organizations and agencies “within their spheres of operation while as necessary giving general *guidance* to them about the impact of their activities on the implementation of the peace settlement.”¹²

21. Article V of Annex 10 provides, “The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement [Annex 10]”. (emphasis added). This provision, as its plain language makes clear, does not extend the High Representative’s authority to interpret “this Agreement” (Annex 10) to any other parts of the Dayton Peace Accords such as Annex 4, the BiH Constitution.¹³ That responsibility falls to the treaty parties.
22. Moreover, Annex 10 must be read in the context of the rest of the Dayton Accords. Any reading of Annex 10 that would give the High Representative powers to enact or overrule legally enacted legislation, appoint judges and prosecutors, or remove and ban officials without due process is wholly inconsistent with Annex 4 (the BiH Constitution) and Annex 6 (the Human, Civil and Political Rights Guarantees).
23. A legally valid interpretation of the High Representative’s mandate in Annex 10 must also be guided by the canon that an agreement not be construed to give what is not explicitly given. In cases where a treaty delegates to an international official responsibilities touching upon domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.¹⁴ Any actions outside this mandate are *ultra vires* and thus without any force or effect.
24. In sum, an order of the High Representative is legally invalid if: (1) it is inconsistent with the fundamental human, political and civil rights and freedoms specified as having legal priority in the BIH Constitution; (2) if it is inconsistent with general principles of international law, applicable treaties or other provisions of general international law; or (3) it exceeds the authority granted the High Representative in Annex 10 by the parties to that agreement.
25. The Government’s responsibility to cooperate with the High Representative in connection with peace implementation does not supersede the Government’s obligations under domestic and international law described above. When an order of the High Representative conflicts

¹² Agreement on Civilian Implementation of the Peace Settlement (Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina), art. II(1)(c) (emphasis added).

¹³ Confirming this plain language, in its first resolution about Bosnia after the Dayton Peace Accords, the UN Security Council approved a resolution “reaffirm[ing] that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement . . .” S.C. Res. 1088 (1996). *See also, e.g.,* S.C. Res. 1174 (1998) (“reaffirm[ing] that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement . . .”).

¹⁴ *See* W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT’L L. 231, 234 (1989).

with the Government's duties under the Constitutions of BiH and Republika Srpska or obligations under international law, the constitutional and legal obligations of BiH and Republika Srpska law must have priority.

Government Assessment of High Representative's Decisions

26. Taking into account what has been stated above, the Government assesses the decisions of the High Representative pursuant to the Government's obligation to operate in accordance with the rule of law. The government has justifiably concluded that its legal obligations preclude its acceptance or enforcement of the decisions for the reasons stated herein. The Government holds that such decisions, in addition to their violating domestic and international law, also attempt to disrespect Republika Srpska and its institutions, which enjoy constitutional and democratic legitimacy, unlike the High Representative who is an unelected foreigner.
27. Because the decisions of the High Representative may result in injury, including economic injury, to those whose rights and wellbeing the Government is charged to protect, the Government will also consider what actions must be taken to provide redress for such injury.

Referendum

28. For reasons set forth above, the authorities have a legal obligation not to accept or enforce the High Representative's decisions. In addition, the RS National Assembly will be requested to provide its position; and through a referendum, the citizens of Republika Srpska will be allowed to express their view on whether or not the Government should accept the High Representative's decisions, which exceed his mandate. This mandate derives from Annex 10, to which Republika Srpska is a signatory (as well as all other annexes of the Dayton Accords).

Appendix 3

Referenda Are Vital Instruments of Democracy

I. Introduction

A. The Government of Republika Srpska (“the Government”) fully supports the Dayton Accords – including the Constitution of Bosnia and Herzegovina (“BiH”) – and is committed to the rule of law and respect for human rights. These principles, and the Government’s responsibility to its citizens, have compelled it to protect the Republika Srpska and its citizens from the unlawful actions of the High Representative, who has frequently violated the Dayton Accords, the rule of law, and human rights. In December, for example, the High Representative issued a decree casting aside the BiH Parliamentary Assembly’s decision not to extend the mandates of foreign judges and prosecutors in BiH. He alleged no procedural irregularity, but simply enacted by decree his own legislation in complete contempt of the result duly arrived at by the elected legislature.

B. The Government intends to hold a referendum to allow the citizens of Republika Srpska to express their views on whether the Government should accept and implement actions of the High Representative that are contrary to the Dayton Accords and human rights treaties and other principles of international law binding upon the Government.

C. Some have alleged that the Government is planning a secession referendum. This is false, as the Government has stated publically and privately.

D. The High Representative has repeatedly suggested that the Government is not representing its constituents’ views and that the High Representative’s actions are more aligned with their interests. In addition, the High Representative has frequently called on citizens to make their voices heard in the remaining months before the 2010 election. Yet the High Representative is now opposing a new referendum law and the holding of referenda by the RS that would boost government accountability and increase opportunities for RS citizens to make their views known.

E. Referenda are widely used by governments across Europe and around the world as a mechanism for insuring democratic rule. Any attempt to prevent such a referendum would be a direct affront to democracy and the rule of law.

F. It is all the more important for RS citizens to be heard in a country in which a single, unelected official claims extraordinary peremptory powers free from any review or limits. In response to a 2006 BiH Constitutional Court decision, in which the Court held that the High Representative’s use of the Bonn Powers violated the Constitution and the European Convention on Human Rights, the High Representative issued an order purporting to overrule the Constitutional

Court.¹ The High Representative went on to decree that “any proceeding instituted before any court in [BiH], which challenges or takes any issue in any way whatsoever with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent.”² All of this makes the right to a referendum essential to ensure that the citizens of Republika Srpska have a mechanism through which to be heard.

II. Legal

A. Legality of referenda in general

1. No provision in the Dayton Accords prohibits or restricts referenda. Indeed, the Dayton Accords in Annex 4 (the BiH Constitution), Article I, paragraph 2 requires that BiH “be a democratic state, which shall operate under the rule of law and with free and democratic elections.” The Preamble of the BiH Constitution states: “Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society.”

2. Referenda are an integral part of the practice of democratic states across Europe and the world. As the Council of Europe’s Committee of Ministers stated in a 2008 Declaration, “[D]emocracy is one of the foundations of the Council of Europe and . . . it is expressed not only through elections but also through referendums”³ In a 2005 Resolution, the Council’s Parliamentary Assembly proclaimed, “Referendums represent a long-standing political tradition in a number of Council of Europe member states; in others, the participation of citizens in the decision-making process through referendums is a more recent achievement, coinciding with their passage to pluralist and representative democracies.”⁴ Similarly, in a 2007 resolution, the Parliamentary Assembly said, “Referendums are an instrument of direct democracy which belong to the European electoral heritage.”⁵

3. Referenda by sub-state entities are a well-established part of democratic government. The Council of Europe has made clear that its strong support for referenda extends to those held at political subdivisions below the state level.

¹ Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (23 March 2007).

² Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (23 March 2007).

³ Declaration by the Committee of Ministers of the Council of Europe on the Code of Good Practice on Referendums, 27 Nov. 2008.

⁴ Council of Europe, Parliamentary Assembly Res. 1704 (2005), 29 April 2005, para. 1.

⁵ Council of Europe, Parliamentary Assembly Res. 1592 (2007), 23 Nov. 2007, para. 1.

a) As the Council of Europe's Congress of Local and Regional Authorities recognized in a 2007 resolution, "referendums, *whether at national, local or regional level*, constitute one of the main instruments of direct democracy giving citizens the possibility to take part in political decision making as well as in public matters which directly concern them"⁶

b) Moreover, the Council's Committee of Ministers, in Recommendation No. R (96) 2, recommended that member states "acknowledge that *local and regional authorities* may, within the autonomy granted to them, make provisions for referendums and/or popular initiatives at local level, by specifying, if appropriate, the matters for which these instruments are admitted or forbidden as well as the consultative or decisionmaking character of the referendums"⁷

c) In its 2001 Recommendation to member states on the participation of citizens in local public life,⁸ the Committee of Ministers recommended that states consider legislation enabling:

ii. popular initiatives, calling on elected bodies to deal with the matters raised in the initiative in order to provide citizens with a response or initiate the referendum procedure;

iii. consultative or decision-making referendums on matters of local concern, called by local authorities on their own initiative or at the request of the local community"

4. The Constitution of Republika Srpska has long specifically provided for referenda, stating at Article 77 that the RSNA may decide on individual issues after a vote of the citizens in a referendum.⁹ Article 70 of the RS Constitution gives the RSNA the power to organize a referendum. Moreover, the RS has had a statute providing for referenda since 1993. Over the years, Bosniak politicians have challenged many

⁶ Council of Europe, Congress of Local and Regional Authorities Res. 235 (2007) (emphasis added).

⁷ Recommendation of the Council of Europe Committee of Ministers to Member States on referendums and popular initiatives at local level, Rec(1996)2, adopted 15 Feb. 1996 (emphasis added).

⁸ Recommendation of the Council of Europe Committee of Ministers to member states on the participation of citizens in local public life, Rec(2001)19, adopted 6 Dec. 2001, appendix II(c)(4).

⁹ In addition, Amendment XXXII to Article 76, paragraph 1 of the RS Constitution provides that the right to propose laws, other regulations and enactments lies with the President of the Republic, Government, every representative of the Assembly, or at least 3,000 voters.

provisions of the RS Constitution and many RS laws in the BiH Constitutional Court. Some provisions and laws have been struck down as contrary to the BiH Constitution. But the RS Constitution's affirmation of the Entity's ability to hold referenda has never even been challenged. Nor has the 1993 RS referendum statute, which has just been superseded by the new referendum law.

B. Legality of the planned referendum

1. There is nothing in the nature of the referendum the Government is planning that would somehow render it unlawful. Although the Government has not determined the precise language of any referendum questions, the Government intends to seek a referendum soliciting voters' views about the High Representative's imposition of legislation on BiH by decree and other actions that violate the Dayton Accords, the rule of law, and human rights.

2. The proposed referendum is plainly suitable under the Council of Europe's standard. The Council's Parliamentary Assembly, in Resolution 1121, invited member states "to regard all subjects as suitable for being submitted to a referendum, with the exception of those which call in question universal and intangible values such as the human rights defined in the Universal Declaration of Human Rights and the European Convention of Human Rights, and the basic values of democracy in general and parliamentary democracy in particular."¹⁰

3. The proposed referendum does not question universal intangible values such as human rights or the basic values of democracy in general and parliamentary democracy in particular. Indeed, the proposed referendum is intended as an affirmation of representative democracy and human rights against a High Representative who shows them little regard.

III. Policy

A. Policy reasons for the enactment of a new referendum law

1. The new referendum law enacted by the RSNA on 10 February 2010 was drafted in light of the Code of Good Practice of the Council of Europe's Venice Commission (CDI AD 2007-2008) and the Recommendations of the Council of Europe's Committee of Ministers on citizens' participation in public life at the local level (Rec (2001) 19).¹¹ In addition, as required by RS Government rules of procedure, the RS

¹⁰ Council of Europe, Parliamentary Assembly Res. 1121 (1997), 22 April 1997, para. 15(ii).

¹¹ Memorandum from Jasna Brkić, Minister of Economic Relations and Regional Cooperation, Republika Srpska, to Zoran Lipovac, Minister of Administration and Local Self-Government, Republika Srpska, 21 Jan. 2010.

Ministry for Economic Relations and Regional Cooperation analyzed the proposed new referendum law with respect to its consistency with EU regulations.¹² After examining EU law, the Ministry determined that there are no sources of *acquis communautaire* pertinent to the proposed law.¹³

The Council's Parliamentary Assembly, in a 2005 resolution, recommended "the use of referendums as a means to reinforce the democratic legitimacy of political decisions, enhance the accountability of representative institutions, increase the openness and transparency of decision making and stimulate the direct involvement of the electorate in the political process."¹⁴ In the same resolution, the Parliamentary Assembly said it "considers referendums as one of the instruments enabling citizens to participate in the political decision-making process . . ."¹⁵

2. In a 2007 resolution, the Council's Parliamentary Assembly called referenda "a positive means to enable citizens to participate in the political decision-making process and to bridge the distance between them and decision makers."¹⁶ The Parliamentary Assembly, in a 2003 resolution, called on member states to consider "more direct elements of democratic decision-making, such as popular initiatives and referendums, in particular at local level, as a means of increasing the public's identifying with political decisions thus taken."¹⁷

B. Policy reasons for the planned referendum

1. It is all the more important for citizens to be heard in a country in which a single, unelected official claims and exercises such extraordinary peremptory powers. The High Representative, like most rulers who claim unbridled power, is intolerant of any suggestion – no matter the source – that his authority has limits. For example, in a 2006 decision, the BiH Constitutional Court unanimously held that the High Representative's decrees summarily removing individuals from public office violate the BiH Constitution and human rights protected under the European

¹² Memorandum from Jasna Brkić, Minister of Economic Relations and Regional Cooperation, Republika Srpska, to Zoran Lipovac, Minister of Administration and Local Self-Government, Republika Srpska, 21 Jan. 2010.

¹³ Memorandum from Jasna Brkić, Minister of Economic Relations and Regional Cooperation, Republika Srpska, to Zoran Lipovac, Minister of Administration and Local Self-Government, Republika Srpska, 21 Jan. 2010.

¹⁴ Council of Europe, Parliamentary Assembly Res. 1704 (2005), 29 April 2005, para. 5.

¹⁵ Council of Europe, Parliamentary Assembly Res. 1704 (2005), 29 April 2005, para. 1.

¹⁶ Council of Europe, Parliamentary Assembly Res. 1592 (2007), 23 Nov. 2007, para. 2.

¹⁷ Council of Europe, Parliamentary Assembly Res. 1353 (2003), 25 Nov. 2003, para. 15(a)(iii).

Convention on Human Rights.¹⁸ In response to that decision, the High Representative issued an order purporting to overrule the Constitutional Court,¹⁹ even though the Constitution makes clear that the court's decisions are "final and binding."²⁰ The High Representative went on to decree that "any proceeding instituted before any court in [BiH], which challenges or takes any issue in any way whatsoever with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent."²¹ The High Representative has also sought to halt criticism of his unlawful acts by the Government and the RSNA. All of this makes it essential that the citizens of Republika Srpska have a mechanism through which to be heard.

IV. Conclusion

Peremptory authority to set aside the decisions of democratically and constitutionally selected legislatures, as exercised by an unelected, foreign individual – the High Representative – is inimical to democratic and constitutional governance. It is the High Representative's assertion of unlimited powers that is the real affront to the Dayton Accords and the principles of democracy and rule of law that the Accords affirm.

¹⁸ Appeal of Milorad Bilbija et al, No. AP-953/05, para. 78 (8 July 2006).

¹⁹ Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (23 March 2007).

²⁰ Article VI/4 of the Constitution of Bosnia and Herzegovina.

²¹ Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (23 March 2007).



REPUBLIC OF SRPSKA GOVERNMENT

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No.: 04/1.-229/09

16 November 2009

H. E. Ambassador Thomas Mayr-Harting
President of the United Nations Security Council
Permanent Mission of Austria to the United Nations
600 Third Avenue, 31st Floor
New York, NY 10016

Your Excellency:

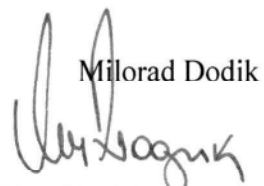
As you are aware, the Security Council has scheduled a debate on Bosnia and Herzegovina ("BiH") on 23 November 2009. The Government of Republika Srpska (the "Government"), as a signatory to each of the 11 annexes to the Dayton Accords and as one of the two Entities that comprise BiH, respectfully requests that its views be taken into consideration by the Council during this debate.

To assist the Council with its deliberations, the Government has prepared the attached Second Report of Republika Srpska to the Security Council on the Situation in Bosnia and Herzegovina. (The first Report to the Security Council was provided in February 2009.) The Report begins by examining the significant political progress that has been made this year in BiH by BiH's elected officials. The Report also takes note of the conclusions of experts that there is no threat to international peace and security in BiH. Next, the Report explains how progress in BiH has been hindered by serious, heightened intervention of the High Representative and certain States into internal BiH affairs. The Report then describes the relevant law, including that which applies to the Peace Implementation Council and the High Representative, and the need for adherence to the law and a mechanism for redress when breached. Finally, the Report outlines the Government's response to the High Representative's unlawful actions and the Government's commitment and program for achieving EU integration and constitutional reform.

The Government believes firmly that, in the absence of unlawful international interference, BiH's elected leaders can accelerate political progress and build a better future for BiH.

The Government, which speaks for many citizens of BiH directly affected by the Council's decisions, trusts that the Council will give its views careful consideration.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read 'Milorad Dodik', is positioned above the printed name.

Milorad Dodik

PRIME MINISTER OF THE REPUBLIC OF SRPSKA

**SECOND REPORT OF REPUBLIKA SRPSKA TO THE SECURITY COUNCIL ON
THE SITUATION IN BOSNIA AND HERZEGOVINA**

November 2009

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SECOND REPORT OF REPUBLIKA SRPSKA TO THE SECURITY COUNCIL ON THE SITUATION IN BOSNIA AND HERZEGOVINA

1. In light of serious recent developments that undermine democracy, human rights and the rule of law in Bosnia and Herzegovina (“BiH”), the Government of Republika Srpska (“Government”) respectfully submits this Second Report to the United Nations Security Council to assist the Council in its upcoming deliberations on BiH. The Government provides this Report as a party to the agreements comprising the Dayton Accords, including the Agreement on the Civilian Implementation of the Peace Settlement set forth in Annex 10 thereto (“Annex 10”).

2. The Government reiterates its request that the Security Council and the broader international community proceed in a manner that respects the sovereignty of BiH, international legal agreements, including the Dayton Accords, and other principles of international law and the rule of law. In addition, the Government wishes to call the Security Council’s attention to the urgent need for the cessation of further violations of international law and basic human rights committed by the High Representative and his office (“OHR”). This should be accomplished through (1) the OHR’s closure and, until then, its adherence to its limited mandate established by the parties to Annex 10; and (2) the urgent establishment of a mechanism whereby civilians who have been harmed by human rights violations of the High Representative can seek legal recourse.

I. Executive Summary

3. In the Government’s first Report to the Council in February of this year, the Government highlighted the uninterrupted peace and significant progress that has been made in BiH since the end of the war nearly fourteen years ago, including the important progress made through compromise among the key political leaders initiated in November 2008 in Prud.

4. Some reports lately have portrayed BiH as sliding backwards or in crisis. But the record of BiH’s recent progress, attested to by independent observers, disproves this faulty portrayal. As explained in Section II of this Report, BiH has continued to make important progress in many areas, including the Brčko District constitutional amendment, visa liberalization, EU integration, the economy, human rights (except for actions of the High Representative targeting citizens), and security and crime prevention.

5. An even more groundless claim is that there is a serious threat of a resumption of hostilities in BiH. Section III of this Report shows that this claim is refuted by the informed, independent assessments of international military and security officials. These assessments all attest that the security situation in BiH is stable and secure. The current situation does not constitute a threat to international peace and security, and thus there is no longer a factual or legal basis for the Security Council to act under Chapter VII of the UN Charter. Nor can false assertions of a danger of renewed hostilities be grounds for continuation of the OHR or accepting the continued use of the Bonn Powers in contravention of law.

6. In its Report to the Council in February 2009, the Government warned of the possibility that BiH’s progress could be impeded by certain actors in the international community

attempting to use the appointment of a new High Representative to implement a dangerous policy of “muscular intervention” into the governance and domestic affairs of BiH:

The Government wishes to express its grave concern that the actions of some within the international community could undermine the foundation for long-term peace and stability of BiH. Some within the international community seek to impose a structure and system of government that is in direct contravention of the federal structure and system agreed to by the parties in the Dayton Accords—a structure and system that enabled the three constituent Peoples to reach agreement in Dayton and that is the basis for durable peace and stability among them in the future. Rather than support the efforts of BiH’s elected leaders to work through the processes established in the BiH Constitution, those wishing direct foreign intervention intend to achieve their objectives by the exercise of peremptory powers against the democratically elected authorities and constitutional institutions of BiH. They justify such actions by attempting to create a false perception that the situation within BiH is “in crisis.”

7. Unfortunately, as described in Section IV of this Report, this damaging policy has been aggressively implemented since the appointment of Ambassador Valentine Inzko as the High Representative. The new High Representative has exercised his peremptory powers 20 times during the first six months of his tenure, almost seven times as often as his predecessor exercised them during the previous six months. Moreover, the nature of his decrees has been highly and unnecessarily intrusive. His decrees have included, *inter alia*, declaring invalid a set of conclusions approved by the Republika Srpska National Assembly (“RSNA”), removing and banning officials from public positions without any due process, and jeopardizing significant property rights of the Republika Srpska and its citizens.

8. And this month, leaked OHR reports revealed that the OHR has been secretly investigating and alleging criminal activity by numerous prominent government, political, religious and business leaders within BiH. The OHR has reportedly delivered this information to a number of international diplomats and missions.

9. Although BiH officials have continued to move BiH forward, progress could be stalled by continued foreign intervention into domestic political and economic affairs—by the threat and use of the Bonn Powers or other coercive means. Such actions are fundamentally destabilizing and disruptive of the consensus building and reform efforts of BiH’s own authorities.

10. In addition to hampering BiH’s progress, these actions are unlawful. Section V of this Report examines the legal authority of the High Representative and the Peace Implementation Council (“PIC”) and explains why their actions routinely exceed their legal mandates. Neither the Dayton Accords nor the UN Security Council has given the PIC authority to intervene in BiH’s domestic affairs or international relations. The High Representative’s narrow mandate, which is described clearly in Annex 10 of the Dayton Accords, does not include sweeping authorities such as the power to enact laws or remove democratically elected officials. Moreover, the Security Council has never assigned additional powers to the High Representative.

11. Section VI of this Report explains the Government's response to the damaging and unlawful actions of the High Representative and certain members of the PIC Steering Board. The Government is renewing its call for the termination of the position of High Representative. Until such time, the Government, acting according to resolutions of the RSNA, cannot accept as valid under international law any further attempts of the High Representative to use the Bonn Powers.

12. Additionally, the Government has called upon the Presidency of the EU and the Council of Europe's Commissioner for Human Rights to support the creation of an independent international tribunal to provide redress to individuals whose human rights have been violated by the High Representative's use of the Bonn Powers. To date, the High Representative has successfully blocked all existing legal forums in BiH and the European Court of Human Rights such that injured individuals have no remedy whatsoever.

13. As explained in Section VII of this Report, despite the serious attempts to undermine sustainable progress, the Government is committed to continue working to improve the lives of all BiH citizens, including through accession to the EU. Issues of EU accession, including constitutional reform, are not matters of peace implementation and thus are not within the High Representative's mandate; nor are they under the authority of the PIC.

14. The Government will continue striving to improve governance through reforms aimed at achieving greater efficiency and functionality. However, constitutional reform in the name of "efficiency" and "functionality" cannot be a cover for a hidden agenda to transform BiH's Constitution contrary to the fundamental principles of governance established by treaty at Dayton. Efficiency and functionality can be achieved in a decentralized, federal state—as in many other countries.

15. Constitutional reform should generally follow the sequence set out by the PIC Steering Board in June 2009 and the Presidency of the EU in October 2009.. Namely, constitutional reform, which the EU has stated is *not* required for application for EU membership, should be taken up after the closure of the OHR, which the EU has stated *is* required for application for EU membership.

16. The failure of the recent meetings at Butmir is a lesson in how not to achieve reform. At Butmir, certain members of the PIC Steering Board—with the assistance of the OHR—tried to impose on BiH political leaders a package of drastic and destabilizing changes to the BiH Constitution. All but one of the political leaders present rejected the package. The Butmir process failed because it (1) proposed unwelcome constitutional restructuring that would raze the Dayton architecture that protects the vital interests of BiH's Constituent Peoples and makes BiH a viable state; (2) sought to circumvent the transparent and legal process required to change the Constitution; and (3) attempted to add constitutional reform onto the PIC's 5+2 Agenda as another condition for OHR closure. This attempt to satisfy some Bosniak politicians' desire for a unitary state before the OHR's closure undermined the hosts' credibility as neutral mediators.

17. As discussed in Section VIII, the way forward for BiH must be based on full commitment and adherence to the following principles:

- International law and rule of law must be adhered to by all parties, including the international community and especially the High Representative.
- The High Representative (and peremptory powers) must come to an end; a legal remedy must be made available for individuals whose rights have been violated by the High Representative.
- BiH must be treated as an equal and fully sovereign state free from international intervention in its domestic affairs.
- Constitutional reform must be accomplished through a transparent, democratic and constitutional process in order to achieve legitimate and enduring reform.
- The accession process to the EU and Euro-Atlantic structures—including so-called “reforms” in the name of “efficiency” and “functionality”—must not be a guise for fundamental restructuring of the Constitution that removes safeguards set forth in the Dayton Accords that brought about and ensure peace. The rights and competencies of the Entities as established in the Dayton Accords must be respected.

18. The Government believes that BiH can accelerate legitimate and sustainable political progress. The international community’s contribution should be to respect the rule of law, BiH sovereignty, and the federal structure mandated by the Dayton Accords. Without unlawful interference by the High Representative and PIC Steering Board, BiH’s leading parties can negotiate in good faith, develop consensus, and build a better life for BiH’s citizens.

II. BiH Authorities Are Achieving Political Progress

19. As the Security Council has repeatedly declared, the primary responsibility for implementation of the Dayton Accords lies with the democratically elected authorities in BiH themselves.¹ Some reports suggest that there has been no recent political progress in BiH and that its elected officials are incapable of reaching agreements to move the country forward. This is a fabrication propagated by those who want BiH to continue to be treated as if it were a protectorate. In reality, BiH authorities, in the past year, have continued to make progress on a broad range of fronts. As explained in the examples below, the hard work of governance is being vigorously pursued by BiH’s elected officials.

¹ See UNSC Resolution 1845 ¶ 2 (November 20, 2008); UNSC Resolution 1785 ¶ 2 (November 28, 2007); UNSC Resolution 1722 ¶ 2 (November 21, 2006); UNSC Resolution 1639 ¶ 2 (November 21, 2005); UNSC Resolution 1575 ¶ 2 (November 22, 2004); UNSC Resolution 1491 ¶ 2 (July 11, 2003); UNSC Resolution 1423 ¶ 2 (July 12, 2002); UNSC Resolution 1357 ¶ 2 (June 21, 2001); UNSC Resolution 1305 ¶ 2 (June 21, 2000); UNSC Resolution 1247 ¶ 2 (June 18, 1999); UNSC Resolution 1174 ¶ 2 (June 15, 1998); UNSC Resolution 1088 ¶ 3 (December 12, 1996).

A. Breakthrough Agreements in the Prud Process

20. On November 8, 2008, in the town of Prud, the leaders of the three main political parties negotiated a series of landmark agreements, expressing a firm consensus on key issues that had previously divided them. These included agreement on apportionment of state property, resolution of defense property, the legal status of Brčko District, conduct of a census, key constitutional reforms, and other important issues. The UN Security Council, the PIC, and the High Representative praised the Prud agreements.² On January 26, 2009, the leaders of the three main parties met again in Banja Luka and reached further significant agreements.

21. In February, the three leaders agreed on an amendment to the BiH Constitution on the final status of the Brčko District, and the BiH Council of Ministers recommended it to the Parliamentary Assembly. Both houses of the BiH Parliamentary Assembly approved the constitutional amendment in March. The European Commission's 2009 Progress Report for Bosnia and Herzegovina (hereinafter "EC Progress Report") calls the approval of the Brčko Amendment "a major development and step forward."³

B. Rapid Progress toward Visa-Free Travel to EU

22. In the past several months, BiH has dramatically accelerated its progress toward meeting the European Commission's long list of stringent conditions for visa-free travel to the EU. The EC's 2009 Progress report finds, "In the framework of the visa liberalisation dialogue process, Bosnia and Herzegovina has made good progress in the areas of justice, freedom and security . . ."⁴

23. On 2 October 2009, the European Stability Initiative ("ESI") reported on its extensive study of BiH's recent performance with respect to each of the Commission's conditions, finding that BiH has made "phenomenal progress in a short period of time."⁵ In May, BiH had lagged far behind Serbia and Montenegro. The Commission on 15 July 2009 offered visa-free travel to both Serbia and Montenegro.⁶ By September, however, BiH had surpassed both countries in its fulfillment of the Commission's conditions.⁷ This progress, according to ESI, "required a

² S.C. Res. 1845 (20 Nov. 2008); Communiqué of the Steering Board of the Peace Implementation Council, 20 Nov. 2008; Miroslav Lajčák's exclusive interview for *www.reci.ba*: "New EU strategy for BiH," 10 Nov. 2008.

³ Commission of the European Communities, *Bosnia And Herzegovina 2009 Progress Report* (Commission Staff Working Document), 14 Oct. 2009 (hereinafter "EC Progress Report"), at 8.

⁴ EC Progress Report at 6.

⁵ European Stability Initiative, *Bosnian Visa Breakthrough* (preliminary version), 2 Oct. 2009 ("hereinafter ESI Visa Study"), at 4, available at www.esiweb.org/pdf/schengen_white_list_bosnian_visa_breakthrough.pdf.

⁶ Gerald Knaus, *Bosnia's Visa Breakthrough and the Power of Europe*, European Stability Initiative, 28 Sept. 2009, available at www.esiweb.org/index.php?lang=en&id=67&newsletter_ID=42.

⁷ Knaus.

summer of hard work on the part of Bosnia's leaders—and a series of compromises between Bosnia's political parties in the sensitive area of security policy. The results are remarkable.”⁸

24. In June, as noted in the ESI study, the BiH Parliamentary Assembly, using urgent procedure, adopted four key laws on “border control, control of weapons and military equipment, international legal aid in criminal matters and prevention of money laundering and financing of terrorist activities.”⁹ In a 31 August 2009 speech, the High Representative said, “[W]ith the recent passage of four laws related to visa liberalization which had previously failed in the parliamentary assembly, we saw evidence that BiH political representatives *can* work out their differences.”¹⁰

25. The parties also agreed to adopt or amend Entity legislation on weapons and on transportation of dangerous matter.¹¹ Responding to the Commission’s concerns about lack of information exchange between law enforcement agencies, the state, Entity, and Cantonal police bodies agreed to “exchange a wide range of information, from criminal records to investigations, ID checks and the possession of weapons.”¹² BiH has also recently accelerated the introduction of new biometric passports.¹³ In addition, BiH since May has put in place an automated system for forwarding to Interpol information on lost and stolen passports.¹⁴ Moreover, on 23 September 2009, the agencies stationed at BiH’s borders reached an Agreement on Mutual Cooperation.¹⁵

26. On 24 September 2009, the BiH Council of Ministers adopted and sent to parliament a law establishing an independent anti-corruption body.¹⁶

27. In a 30 September 2009 press release, the High Representative acknowledged “faster progress” toward meeting the Commission’s criteria as he welcomed the BiH Council of Ministers’ adoption of a Strategy and Action Plan against money laundering and terrorist financing and an Agreement on Cooperation and Exchange of Information from Police and Prosecutorial Records.¹⁷ As the High Representative’s release recognized, “BiH political leaders

⁸ ESI Visa Study at 4.

⁹ *Id.* at 4.

¹⁰ Speech by High Representative and EU Special Representative Valentin Inzko To a Conference of Ambassadors and Heads of Mission of BiH, 31 Aug. 2009, available at www.ohr.int/ohr-dept/presso/presssp/default.asp?content_id=43901.

¹¹ ESI Visa Study at 4.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Office of the High Representative, *High Representative Welcomes Today’s Decisions by Council of Ministers on Visa Liberalisation*, 30 Sept. 2009, available at www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=44012.

are responsible for fulfilling [the Commission's] criteria, and on this occasion they have demonstrated that they can carry out their responsibilities"¹⁸

28. BiH's rapid progress since May toward satisfying the Commission's visa liberalization criteria demonstrates its leaders' ability to compromise and approve necessary reforms.

C. EU Integration

29. The EC Progress Report finds that BiH's implementation of its Interim Agreement with the EU "has been satisfactory overall in its first year"¹⁹ The Report notes, "As a potential candidate for EU membership, Bosnia and Herzegovina aligned itself with 100 [Common Foreign and Security Policy] declarations from a total of 128 relevant declarations adopted by the EU during the reporting period."²⁰ BiH also, according to the Report, "joined its first Community programme - the 7th Framework Programme for research, technological development and demonstration activities."²¹ In January 2009, BiH, "became an associated country and eligible to fully participate in the programme."²²

30. Among the requirements for EU integration are the enactment of a BiH Law on Obligations and the modernization of the banking supervision system.²³ The main political parties have agreed to implement these two measures, which the High Representative says "are key elements in preparing this country for full participation in the free movement of goods, services, workers and capital – the principle that underpins EU membership."²⁴

D. Economy

31. Although BiH continues to need further economic development, its political leaders have continued to improve its economic competitiveness in spite of the global economic crisis. Until the onset of the crisis, BiH was one of Europe's fastest growing economies.²⁵ As the High

¹⁸ *Id.*

¹⁹ EC Progress Report at 5.

²⁰ *Id.* at 6.

²¹ *Id.* at 7.

²² *Id.* at 44.

²³ Remarks by High Representative and EU Special Representative Valentin Inzko At the Vienna Economic Talks, 27 September 2009, available at www.ohr.int/ohr-dept/preso/presssp/default.asp?content_id=43993.

²⁴ *Id.*

²⁵ Speech by High Representative and EU Special Representative Valentin Inzko at the Velden Economic Forum, 16 September 2009, available at www.ohr.int/ohr-dept/preso/presssp/default.asp?content_id=43950.

Representative said on 27 September 2009, “[E]ven as crises have come and gone, there has been steady and substantial progress in upgrading almost every aspect of the BiH economy.”²⁶

32. The EC Progress Report finds, “Despite the repercussions of the global financial crisis on Bosnia and Herzegovina, the financial sector remained sound and well-capitalised and its liquidity position was not seriously undermined.”²⁷ In May, according to a press release, the High Representative “commended the Central Bank Governor for the Bank’s timely and effective reactions that have maintained confidence in the BiH banking sector and protected the country’s fiscal stability.”²⁸ In August, moreover, the High Representative praised the new Governing Board’s quick reappointment of the Central Bank governor.²⁹ BiH, the Progress Report says, “is an open economy” that “has constantly gained market shares in the EU during the past decade.”³⁰

33. The Fiscal Council of BiH became operational in 2008 and submitted budgets for BiH institutions. It was the first time since the Dayton Agreement that the following year’s budget was submitted for adoption before December 31. The BiH Parliamentary Assembly approved the budget in January 2009. According to the EC Progress Report, BiH made progress toward “improving fiscal sustainability and entrenching the rule of law.”³¹

34. In the past year, BiH has also continued negotiations for membership in the World Trade Organization. According to the EC Progress Report, BiH “has made good progress in bringing its trade relevant legislation in line with the WTO requirements.”³² The Report also takes note of BiH’s progress in the customs field.³³

35. In June 2009, BiH enacted a new Law on Excise Duties, bringing BiH’s rules closer to those of the EU.³⁴

36. On 30 July 2009, the High Representative said, “We are in a race – we have to fix the economy month by month even as we try to secure a longer-term fix for the political system.

²⁶ Remarks by High Representative and EU Special Representative Valentin Inzko At the Vienna Economic Talks, 27 September 2009, available at www.ohr.int/ohr-dept/presso/presssp/default.asp?content_id=43993.

²⁷ EC Progress Report at 28.

²⁸ *HR/EUSR Inzko Welcomes Continuing Success of BiH Central Bank*, OHR Press Release, 22 May 2009.

²⁹ *Inzko Welcomes Swift Re-Appointment of Central Bank Governor*, OHR Press Release, 12 Aug. 2009.

³⁰ EC Progress Report at 31.

³¹ *Id.* at 8.

³² *Id.* at 44.

³³ *Id.* at 36.

³⁴ *Id.* at 37.

This requires ad hoc decision-making and creative politics. For all its faults, Bosnia and Herzegovina's political establishment is rather good at both those things.”³⁵

E. Human Rights

37. BiH citizens—with the exception of individuals targeted by decrees of the High Representative—continue to enjoy freedom of expression, freedom of assembly, freedom of association, and all the other freedoms guaranteed in the BiH Constitution and the European Convention on Human Rights. The EC Progress Report recognizes that civil and political rights “are broadly respected” in BiH.³⁶

38. The EC Progress Report praises BiH's adoption in July 2009 of “a comprehensive State-level anti-discrimination law.”³⁷ The Report calls the new law, which “covers a wide range of sectors (employment, social security, education, goods and services, housing),” “a positive step towards uniform protection across Bosnia and Herzegovina.”³⁸ The Report praises BiH's “good progress . . . as regards asylum” during the year and says that “[o]verall, the asylum and international protection system in Bosnia and Herzegovina is largely in line with EU and international standards.”³⁹ In what the Report calls a “positive step,” in October of 2008, BiH ratified the Revised European Social Charter.⁴⁰ Moreover, according to the EC Report, BiH “has continued its good progress in relation to property rights.”⁴¹

39. The PIC Steering Board, in its 26 March 2009 Communiqué, praised the BiH Council of Ministers' adoption of a Revised Strategy for the Implementation of Annex VII of the General Framework Agreement for Peace (the Agreement on Refugees and Displaced Persons). The BiH House of Representatives approved the Revised Strategy in May.

F. Security and Crime Prevention

40. The EC Progress Report takes note of BiH's recent “progress in the fight against terrorism.”⁴² According to the Report, the BiH Criminal Code has been amended “for its harmonisation with the Council of Europe Convention on the Prevention of Terrorism”⁴³

³⁵ Speech by the High Representative and EU Special Representative, Valentin Inzko to the Permanent Council of the OSCE, 30 July 2009, available at www.ohr.int/ohr-dept/press/presssp/default.asp?content_id=43778.

³⁶ EC Progress Report at 15.

³⁷ *Id.* at 19.

³⁸ *Id.*

³⁹ *Id.* at 56.

⁴⁰ *Id.* at 19.

⁴¹ *Id.*

⁴² *Id.* at 61.

⁴³ *Id.*

41. According to the EC Progress Report, BiH's "cooperation with ICTY has remained good."⁴⁴ More particularly, the Progress Report said, "Cooperation between ICTY and the State-level and Entity authorities is adequate at operational level, and access to witnesses and archives remains good."⁴⁵ Moreover, in December 2008, the BiH Council of Ministers adopted a National War Crimes Strategy, which the PIC Steering Board welcomed in its 26 March 2009 Communiqué.

42. The EC Progress Report also recognizes BiH's "progress in the fight against drugs."⁴⁶ The report notes, "The national strategy for drug control, suppression and prevention 2009-2013 was adopted in March 2009 by the Council of Ministers and parliament, and an action plan was adopted."⁴⁷

G. Other Areas of Progress

43. The EC Progress Report also takes note of BiH authorities' progress in many other areas. It recognizes "progress in the area of public administration reform, which is a key European Partnership priority," noting improvements in coordination and capacity.⁴⁸ The Report notes, "The general secretariats of the governments at the State and Entity level and in the Brčko District have signed a memorandum of understanding on mutual cooperation which should contribute to the European Partnership priority of enhancing coordination at political, legal and technical level."⁴⁹ Last December, the BiH Parliament completed the process of naming the members of the new state-level Office of the Ombudsman.

44. The Progress Report also cites BiH's progress this year in air transport. The country "became a full member of the Joint Aviation Authorities (JAA). Relations with the European Air Security Agency (EASA) have been put on a formal footing by a working arrangement signed on 7 July 2009."⁵⁰

45. In the field of Intellectual Property law, BiH, the EC Progress Report notes, "has ratified the Protocol relating to the Madrid Agreement concerning the International Registration of Marks, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, the International Classification of Patents Treaty, the Hague Agreement concerning the International Deposit of Industrial Designs, the Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, and the Rome Convention for the Protection of Performers, Producers of

⁴⁴ *Id.* at 24.

⁴⁵ *Id.* at 21.

⁴⁶ *Id.* at 58.

⁴⁷ *Id.*

⁴⁸ *Id.* at 11.

⁴⁹ *Id.* at 10.

⁵⁰ *Id.* at 49.

Phonograms and Broadcasting Organisations.”⁵¹ Moreover, in July 2009, BiH “adopted the Strategy on Development of the Institute for Intellectual Property (2008-2015).”⁵²

46. The EC Progress Report also cites BiH’s progress during the past year in other fields, such as education, antitrust, public procurement, trans-European transport networks, agriculture, and rural development.

III. Accomplishment of Peace Implementation under Dayton Accords and Elimination of Threat to International Peace and Security

47. Despite the political disruptions caused by the interference of the High Representative, as described in detail below, the current situation in BiH does not constitute a threat to international peace and security under the UN Charter. Since the signing of the Dayton Accords almost 14 years ago, there has been no resumption of hostilities or serious threat of such. BiH citizens live, work, and travel freely throughout BiH regardless of their ethnicity or religion.

A. Recent Military Assessments

48. Military assessments utterly refute any suggestion that the situation in BiH is a threat to international peace and security. According to the latest quarterly report on the activities of EUFOR submitted by the EU to the President of the Security Council, “[t]he overall security situation in Bosnia and Herzegovina remained calm and stable throughout the reporting period. Although nationalistic rhetoric continued, it had no impact on the safe and secure environment.”⁵³ The previous four EUFOR reports made identically positive assessments,⁵⁴ and earlier reports also emphasized the stable and calm security situation in BiH.⁵⁵

⁵¹ *Id.* at 40.

⁵² *Id.*

⁵³ *Report of the High Representative for the Common Foreign and Security Policy and Secretary-General of the Council of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina* (1 June 2009 - 31 August 2009) at 4.

⁵⁴ *Report of the Secretary-General and High Representative of the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission (EUFOR) in Bosnia and Herzegovina* (1 March 2009 – 31 May 2009) at 4; *Report of the Secretary-General and High Representative for the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina* (1 Dec. 2008 – 28 Feb. 2009) at 3; *Report of the Secretary-General and High Representative of the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina* (1 Sept. 2008 - 31 Nov 2008) at 4; *Report by the Secretary-General and High Representative for the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission (EUFOR) in Bosnia and Herzegovina* (1 June 2008 – 31 Aug 2008) at 3.

⁵⁵ For example, a EUFOR report in early 2008 noted, “Although there were some protests and demonstrations in Republika Srpska as a result of the Kosovo declaration of independence, the overall security situation in Bosnia and Herzegovina remained calm and stable throughout the reporting period. Local police proved capable of handling the demonstrations.” *Report of the Secretary-General and High*

49. The most recent EUFOR report notes that while the global economic downturn led to a number of strikes in BiH, “[a]ll of these were professionally and capably handled by Bosnia and Herzegovina law enforcement agencies, and had no impact on the overall security situation.”⁵⁶ Moreover, “[t]he annual Srebrenica commemoration in July was conducted without significant incident.”⁵⁷ Looking forward, the latest EUFOR report states, “The security situation is expected to remain stable despite the prospects of continuing political tension.”⁵⁸

B. Recent High Representatives’ Reports

50. The High Representatives’ reports to the Secretary General also acknowledge the stability of the situation in BiH. In his most recent report to the Secretary General covering November 2008 through April 2009, the High Representative said the “safe and secure environment” in BiH “was not threatened during the reporting period” and that “[l]ocal law enforcement agencies proved able to deal with all public unrest issues during the period.”⁵⁹ Earlier High Representatives’ reports have also taken note of the “safe and secure environment” in BiH.

51. The High Representative continues to hold this view. In a 28 October 2009 interview, the High Representative said assertions in the foreign media of the danger of a new war in BiH “are not realistic.”⁶⁰

C. EU Observations

52. At a recent meeting, the Council of the European Union “noted that, despite the challenging political environment, the security situation in Bosnia-and-Herzegovina (BiH)

Representative for the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina (1 Dec. 2007 – 29 Feb. 2008) at 4.

⁵⁶ *Report of the High Representative for the Common Foreign and Security Policy and Secretary-General of the Council of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina* (1 June 2009 - 31 August 2009) at 4.

⁵⁷ *Id.*

⁵⁸ *Id.* at 5.

⁵⁹ *Thirty-fifth Report of the High Representative for Bosnia and Herzegovina* (1 Nov. 2008 - 30 April 2009) at 16.

⁶⁰ Interview: Valentin Inzko, EU Special Representative and High Representative in BiH: “We will prevent any conflict,” DNEVNI AVAZ, 28 Oct. 2009. See also a 3 Nov. 2009 speech in which the High Representative said, “[T]his region has moved on from the violence and failure of the nineties – but its image in the rest of the continent and further afield does not always reflect the progress that has been made. Although the image too is changing; the fact that tourism in BiH is up by 12% this year on last year is an indication that confidence in BiH’s security is growing.” Opening Address By High Representative and EU Special Representative Valentin Inzko, Conference on the Implementation of the OSCE Code of Conduct On Politico-Military Aspects of Security in South Eastern Europe, 3 Nov. 2009.

remained stable.”⁶¹ During the past year, according to the EC Progress Report, “[l]ocal law-enforcement agencies proved able to deal with public unrest issues.”⁶²

D. BiH Contributions to International Peace and Security

53. Far from threatening stability, BiH is contributing to international peace and security. On October 14, 2009, BiH was elected to serve its first ever term as a member of the UN Security Council. Moreover, on 2 October 2009, BiH took a major step toward NATO membership by submitting to its secretary-general a request for a membership action plan.

54. BiH, the EC’s Progress Report says, “has continued to participate actively in regional cooperation.”⁶³ This has included its participation in “regional initiatives, such as the South East European Cooperation Process (SEECP), the Regional Cooperation Council (RCC), the Central European Free Trade Agreement (CEFTA), the Energy Community Treaty and the European Common Aviation Area Agreement (ECAA). Sarajevo hosts the RCC Secretariat.”⁶⁴ Moreover, during the first half of 2009, BiH held the presidency of the Energy Community Ministerial Council.⁶⁵ In addition, BiH has become a full member of the Union for the Mediterranean.⁶⁶

55. In the past year, BiH has also drawn ever closer to the international community by signing and ratifying international agreements. In the environmental field, BiH ratified the Cartagena Protocol on Biosafety, the UN Convention on Biodiversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Bern Convention on Conservation of European Wild Species and Habitats, and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.⁶⁷

56. In the field of nuclear safety, BiH signed the Convention on Early Notification of a Nuclear Accident, the Convention on Physical Protection of Nuclear Material and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency.⁶⁸

57. On 27 July 2009, BiH signed the UN Convention on the Rights of Disabled Persons and its Optional Protocol. In January 2009, BiH ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

⁶¹ Council of the European Union, Press Release, 2943rd Council meeting, General Affairs and External Relations, Brussels, 18-19 May 2009 at 16.

⁶² EC Progress Report at 6.

⁶³ EC Progress Report at 24.

⁶⁴ *Id.* at 22-23.

⁶⁵ Energy Community Ministerial Council, Meeting Conclusions, 26 June 2009, available at www.energy-community.org/pls/portal/docs/350204.PDF.

⁶⁶ EC Progress Report at 7.

⁶⁷ *Id.* at 47.

⁶⁸ *Id.* at 51.

58. The EC Progress Report also notes BiH's good relations with its neighboring countries. The Report cites newly signed or ratified agreements with Albania, Croatia, Montenegro, and the former Yugoslav Republic of Macedonia.

59. The Report, moreover, welcomes as a "positive development" BiH's "adoption of a new law on international agreements, which will make the procedure for conducting bilateral or multilateral agreements clearer and more efficient."⁶⁹

E. No Factual Basis for Continuing Chapter VII

60. The situation in BiH does not warrant the Security Council to continue to act under Chapter VII of the UN Charter. After 14 years of peace, and given the considerable progress and stability that exists in BiH as described above, there is no longer justification for a determination that the situation in BiH constitutes a threat to international peace and security. The facts simply do not support it. As described above, a calm, safe, and secure environment has long prevailed in BiH, and numerous free and fair elections have been held. BiH has been elected to the UN Security Council, admitted to the Council of Europe, become a candidate for NATO membership, participated in UN peacekeeping, and signed a Stabilisation and Association Agreement as an important step toward EU membership. BiH's political leaders have demonstrated that they are capable of resolving difficult issues through negotiation and compromise.

61. Misuse of Chapter VII powers damages Security Council credibility and weakens the long-term viability of Chapter VII itself. This is particularly of concern where Chapter VII powers are falsely asserted as authority for imposing upon a democratically elected government the preferences of foreign states or international organizations regarding the details of domestic governance. The Security Council should forego further reference to Chapter VII with respect to the situation in BiH.

IV. Obstruction of Progress by Advocates of Muscular Intervention

62. The recent progress by BiH's elected officials, described above, has come despite disruption and opposition by advocates of muscular intervention. Although BiH is not in any crisis, their actions raise cause for concern. These activists have implemented a policy of heightened direct intervention in the domestic affairs of BiH through the High Representative's aggressive use of the Bonn Powers. During the first six months of his tenure, High Representative Inzko has employed the Bonn Powers an astonishing twenty times—nearly seven times as often as his predecessor, Ambassador Lajcak, had employed them during the previous six months.

63. A key objective of advocates of muscular intervention is to prevent the OHR's closure (or preserve peremptory powers within an "enhanced" EU Special Representative) in order to transform BiH from the federal state mandated by the Dayton Accords into an anti-Dayton

⁶⁹ *Id.* at 23.

unitary state. Closure of the OHR based on the PIC Steering Board's 5+2 Agenda⁷⁰ appears to be virtually unachievable for two reasons. First, the OHR and certain members of the PIC Steering Board have continuously expanded the requirements for meeting the conditions and objectives in the 5+2 Agenda. Second, and more importantly, some Bosniak leaders want the OHR to remain open, at least until the OHR and certain members of the PIC are able to impose on BiH a constitutional restructuring that transforms it into a centralized state. These leaders, therefore, have refused to cooperate in meeting the conditions and objectives. In this way, those in favor of muscular intervention have transformed the 5+2 Agenda into a permanent barrier to the OHR's long-overdue closure.

64. The resignation of Ambassador Lajcak and appointment of Ambassador Inzko as the new High Representative in March 2009 opened the way for the muscular intervention policy to be implemented on the ground. High Representative Lajcak was unwilling to participate in this interventionist agenda and, just prior to his resignation, warned of its danger:

As long as the country has a HR with unlimited powers, it is a kind of protectorate. Unless we decide to close down the OHR, the role and authority of the HR will broaden and it will surely mean that European issues are taking a back seat, as the OHR and European perspective do not go hand in hand. European philosophy is one of partnership, and strengthening the OHR is a continuation of a protectorate. I came to BiH for European integration, so if we are to press ahead with the OHR, I do not see myself there. In that case, we should have someone else; an EU politician who is a proponent of a protectorate. I am not that kind of politician, and there is no doubt about that.

65. The Government also warned of this possibility in its Report on the Situation in Bosnia and Herzegovina to the Security Council of February 2009. In that Report, the Government said that with Ambassador Lajčák's resignation, "important progress by BiH's major political leaders is threatened by foreign proponents of heightened direct intervention into the governance and domestic affairs of BiH."

66. Unfortunately, upon the appointment of a new High Representative amenable to implementing the approach advocated by the interventionists, the policy of "muscular intervention" was immediately implemented. Under his tenure, High Representative Inzko, with the support of certain members of the PIC Steering Board, has engaged in a series of intrusive actions that are unrelated to implementation of the civilian aspects of the Dayton Accords or to international peace and security. These actions have derailed the Prud process and disrupted consensus building among BiH political leaders.

67. These actions cannot be justified under Chapter VII of the United Nations Charter and violate the Dayton Accords (including the High Representative's mandate set out in Annex 10), the BiH Constitution, Article 2 of the Charter and major international legal obligations of

⁷⁰ As shown in Section V, below, the PIC has no legal authority to demand that any such requirements be met or to determine whether or not the OHR remains open.

members of the United Nations, including international treaties on human, civil and political rights. Moreover, as the Government explained in detail its February 2009 report to the Security Council, the Bonn Powers vastly exceed the High Representative's mandate and authority, which flow from the Dayton Accords.

68. The presence of any High Representative or any international official with Bonn Powers frustrates efforts to negotiate compromises among BiH's Constituent Peoples. Such consensus-building is far more difficult with a High Representative who steps in and imposes solutions favoring one side. The High Representative's presence, thus, corrodes the spirit of give and take necessary for BiH's continued progress.

69. Some of the recent destabilizing actions of the High Representative and other interventionists are described below.

A. The PIC Communiqué of March 2009⁷¹

70. On March 26, 2009, the PIC Steering Board issued a communiqué expanding the list of conditions and demands it calls its "5+2" formula for the closure of the OHR. One of many examples is the Steering Board's treatment of its "Objective Three – Completion of the Brčko Final Award." The Previous PIC communiqué describes the criteria for meeting Objective Three as follows: "Brcko District itself must be given a mechanism by which it can have guaranteed access to the BiH Constitutional Court concerning disputes it may have with the Entities and the State regarding their obligations under the Awards of the Arbitral Tribunal and the status and powers of the District."⁷²

71. In March 2009, after BiH's three main political parties hammered out an agreement on the issue, the BiH Parliament enacted the Constitutional Amendment on the Brčko District, which met the conditions of the PIC's Objective Three. The Principal Deputy High Representative and Brčko Supervisor wrote the Prime Minister of Republika Srpska, leader of one of the parties, stating that the text of the amendment "meets the criteria of providing an amendment that is in conformity with the Awards of the Tribunal and the Constitution, and provides the Brcko District effective access to the Constitutional Court."⁷³ He stated that once the amendment entered into force, he would "be ready, with the approval of the High Representative, to notify the Arbitral Tribunal on the completion of the conditionality foreseen in paragraph 67 of the Final Award as well as to termination of the Supervisory regime to the Peace Implementation Council Steering Board."⁷⁴

⁷¹ The High Representative's 21 May 2009 Report to the UN Security Council was also unnecessarily divisive and unbalanced, indicative of the new policy of muscular intervention. The Government will not comment on the report's contents, but notes its disagreement with many of the points raised in the report.

⁷² Communiqué of the Steering Board of the Peace Implementation Council, November 20, 2008, p. 3.

⁷³ Letter of February 6, 2009, addressed to H.E. Milorad Dodik Prime Minister of the Government of the RS and signed by Raffi Gregorian, Acting High Representative, Supervisor of Brcko.

⁷⁴ *Id.*

72. Yet despite the BiH legislature's enactment of an amendment meeting the requirements of Objective Three, there has still been no conclusion of the Final Award or termination of the Supervisory Regime. Instead, the PIC Steering Board's March Communiqué asserted *new* requirements for fulfillment of Objective Three. These included "full implementation of the constitutional amendment,"⁷⁵ a requirement impossible to measure. In addition, the PIC Steering Board said, "The Entities and the District must resolve remaining issues under the Final Award, such as mutual debt, entity citizenship, and a memorandum of understanding on electricity supply" to fulfill Objective Three.⁷⁶

73. Even if the PIC had the legal authority to require that certain conditions be met to close the OHR, which it does not, the PIC has shown that its policy of conditionality cannot be trusted. Its five objectives and two conditions for supporting OHR closure seem to be infinitely expandable.

B. Decree Purporting to Repeal RSNA Conclusions

74. Another abuse of authority and unlawful intrusion into the domestic affairs of BiH by the new High Representative occurred in its response to a set of Conclusions adopted on 14 May 2009 by the Republika Srpska National Assembly.

75. The RSNA concluded that that the transfer of competencies from the Entities to BiH institutions through decisions of High Representatives was unconstitutional and had not brought positive results. The RSNA further concluded that such competencies should be subject to "an in-depth discussion" with the other governmental bodies within the Federation and BiH institutions. In the event that resolution could not be reached on certain issues through the proper political process, the Conclusions provided for resolution of remaining legal disputes through the judicial process in accordance with the rule of law.

76. The RSNA held that any future transfer of competencies should not be imposed on BiH by the High Representative, but instead should be done "based on the Constitution, clearly prescribed local procedures, consensus and compromise, democratically, and based on the interest of citizens of the Republika Srpska and BiH."⁷⁷

77. On June 20, 2009, the High Representative issued a decision claiming to repeal the Conclusions.⁷⁸ The High Representative's arguments in support of his decision are without any legal merit. Among the High Representative's allegations were that the Conclusions undermined the division of responsibilities established in the BiH Constitution and interfered with the Dayton Accords. This, however, was blatantly false. A key purpose of the Conclusions was to ensure

⁷⁵ Communiqué of the Steering Board of the Peace Implementation Council, March 26, 2009, p. 3.

⁷⁶ *Id.*

⁷⁷ Conclusions, Republika Srpska National Assembly, No. 01-788/09 (14 May 2009).

⁷⁸ Decision Repealing the Conclusions of the Republika Srpska National Assembly No. 01-787/09 and No. 01-788/09, 14 May 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43633.

that any transfers of competencies be consistent with the Constitution and that the fundamental principles of the Dayton Accords be honored and open debate occur among the various elected representatives throughout BiH on these issues.

78. It is a hallmark of functioning and vibrant constitutional federal democracies for the regional and central governments of sovereign states to continually assess and debate the division and exercise of competencies. When disputes cannot be settled through the political process, they are resolved peacefully through resort to judicial proceedings.

79. The questioning and debate called for in the Conclusions should be encouraged by BiH's friends, not condemned. In any event, actions such as the RSNA's passage of the Conclusions are internal affairs of an Entity of a sovereign state. The High Representative's attempt to repeal the RSNA Conclusions was an unnecessary intrusion into the domestic affairs of the BiH and its Entities and a violation of international law.

80. Moreover, it is beyond the authority of the High Representative to act as a judicial body and impose on the duly elected legislative bodies of BiH and the Entities its interpretation of what is constitutional or to restrict the expression of views regarding this issue. It is essential to constitutional democracy that elected officials – and everyone else – be free to express their opinions on all issues of governance.

C. Undermining PIC-Endorsed State Property Agreement

81. Another example of the new High Representative's obstruction of legitimate progress achieved by local officials, and changing the terms of the PIC's 5+2 Agenda for closure of the OHR, is the High Representative's actions related to Objective One: resolution of the issue of apportionment of state property.⁷⁹ When BiH's three main political parties in November 2008 agreed on a PIC-endorsed compromise to resolve the state property issue, one would have expected the OHR to fully support the agreement's implementation. Although High Representative Miroslav Lajčák backed the agreement, since his departure the OHR has inexplicably supported SDA leader Sulejman Tihić's decision to walk away from it.

82. In a 30 October 2008 Statement, the PIC Steering Board set as the criteria for accomplishing Objective One what it called a "functional and territorial compromise" to resolve the state property issue. According to the Statement, the compromise "sees the State-level institutions owning those properties needed for them to 'functionally' exercise their constitutional competencies, while other levels of government would own the remaining State Property based on 'territorial' principles."⁸⁰ The Statement further explained, "In order to deliver in full on the PIC's State property obligation the authorities in BiH must register ownership of all State property needed by the State to exercise its constitutional competencies in the land registries."⁸¹

⁷⁹ Declaration by the Steering Board of the Peace Implementation Council, 27 Feb. 2008.

⁸⁰ Statement by the Ambassadors of the Peace Implementation Council's Steering Board, *State Property: PIC Support For Functional And Territorial Compromise*, 30 Oct. 2008.

⁸¹ *Id.*

83. The PIC Steering Board made clear that the only property required to be allocated and registered at the state level was that property needed for the functional exercise of competencies of the BiH institutions. Based on the territoriality principle, which had been the basis for state property ownership since the end of the war, all other property would remain under the ownership of the Entities.

84. In November 2008 meeting in Prud, the leaders of the three main political parties in BiH agreed to resolve the state property issue using the “functional and territorial” criteria established by the PIC Steering Board. They agreed to allocate state property to BiH, Entities and municipalities based on their functional needs and location of property in the respective territories. This agreement was reached after the Prime Minister of Republika Srpska made the important concession not to oppose on constitutional grounds the right of BiH-level institutions to own (rather than lease) immovable state property.

85. The PIC, UN Security Council and High Representative warmly endorsed this “Prud Agreement.”⁸² In subsequent months High Representative Lajčák worked with political leaders to have this agreement implemented.⁸³ The three leaders formally confirmed their agreement on state property and other matters in January 2009 and proposed that legislation be prepared for implementation, which High Representative Lajčák endorsed.⁸⁴

86. In a sudden and dramatic change of position, in June 2009, the Bosniak political leader Sulejman Tihić asserted that all state property throughout BiH was the property of BiH at the state level and must be registered as such. Only then could state property be allocated to the Entities (or municipalities). Mr. Tihić’s new position is wholly contrary to the functional and territorial criteria set out by PIC as necessary to fulfill Objective One of PIC’s 5+2 Agenda. This position is also in conflict with the BiH Constitution as well as the law and practice of both Entities and BiH.

⁸² Communiqué of the Steering Board of the Peace Implementation Council, 20 Nov. 2008 (“The PIC Steering Board welcomes the political agreement on State Property reached on 8 November [at Prud] as well as the High Representative’s intention to facilitate the resolution of State Property *in a manner that endows the State with ownership over assets needed to fulfill its Constitutional responsibilities*” (emphasis added)); S.C. Res. 1845 (20 Nov. 2008) (“*Noting with satisfaction the agreement between the leaders of three main parties in Bosnia and Herzegovina reached on 8 November 2008, Calling for these proposals to be rapidly put into concrete form...*”); Miroslav Lajčák’s exclusive interview for *www.reci.ba*: “*New EU strategy for BiH*,” 10 Nov. 2008.

⁸³ Lajčák: *Consensus is the best way for progress of BiH*, OHR Press Release, 27 Nov. 2008 (reporting that Lajčák and Haris Silajdzic, the Bosniak member of the BiH Presidency, “agreed that the BiH [Council of Ministers] should firstly proceed with an inventory of *the property the state needs to exercise its competencies*”) (emphasis added).

⁸⁴ Lajčák meets Tihić: *Prud Process Must Be Finalized in the Parliament*, OHR Press Release, 3 Feb. 2009 (quoting Lajčák as stating: “After the signing of the SAA, the Prud process is a positive development in BiH’s political life, since it represents a local process aimed at reaching agreements and making compromises that result in the strengthening of the state. The Prud process as such enjoys strong support from the international community, which expects that agreements originating from the Prud process will be implemented through the parliamentary procedure as soon as possible.”).

87. Rather than condemn Mr. Tihic's obstruction, the OHR has now undertaken an inventory in support of the Mr. Tihic's new position.⁸⁵ The inventory is to consist of all state property as of 1991 wherever located and of whatever ownership status, formerly privatized or otherwise.⁸⁶ It is certain that this inventory—wholly unnecessary to fulfill Objective One—will be a lengthy and controversial process. It will dramatically broaden the scope of State property that has been in dispute and delay closure of the OHR.

88. The PIC has yet to insist that the functional and territorial criteria outlined by the PIC Steering Board and agreed at Prud, be carried out and Objective One be declared met. In fact, certain members of the Steering Board sought to impose a solution to the state property issue during the October meetings at Butmir, discussed below, that was contrary to the PIC's earlier criteria and the Constitution and existing laws of BiH. The Government cannot accept such a proposal, which was rejected by nearly all of the political parties represented at the Butmir talks.

D. Removal and Banning of Individuals from Office and Employment

89. The OHR this year has continued its unlawful practice of removing BiH citizens from public positions and banning them indefinitely without any hearing. On 6 June 2009, the High Representative removed two senior police officials from their positions, alleging that an official from the State Investigation and Protection Agency of BiH was conducting surveillance against the OHR and that the Police Commissioner of Herzegovina-Neretva Canton in the Federation, was threatening international staff of the OHR in order to obstruct an inquiry into his alleged abuse of office.⁸⁷ The High Representative banned both police officials from any public positions indefinitely.

90. Despite the seriousness of the charges and severe harm to their livelihoods and reputations, these officials were afforded no notice of the charges, no hearing before an impartial body to challenge the allegations underpinning the decisions, and no recourse to appeal. Indeed, the entire prosecutorial and judicial system established within BiH was wholly circumvented. The process by which the police officials' rights were stripped from them was conducted behind closed doors without even a pretence of transparency or rule of law. The High Representative emphasized that these decisions have "immediate effect and will not require any further procedural steps."

91. Two days later, the Principal Deputy High Representative and Brčko Supervisor banned three security companies and all individuals they employ or contract from performing any security functions in Brčko for five years. He banned a fourth security company from expanding

⁸⁵ OHR Inventory Team Established (Decision of the High Representative), 12 Sept. 2009, available at www.ohr.int/decisions/plipdec/default.asp?content_id=43935.

⁸⁶ *High Representative Launches State Property Inventory*, OHR Press Release, 12 Aug. 2009.

⁸⁷ Decision to Remove Mr. Radislav Jović from his current position in the State Investigation and Protection Agency of Bosnia and Herzegovina, 6 June 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43576; Decision To remove Mr. Himzo Đonko from his position as the Police Commissioner of Herzegovina-Neretva Canton, 6 June 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43570.

contracts or undertaking new contracts in Brčko for five years. The ban imposed on one company, Alpha Security, was based on the Principal Deputy High Representative's allegation that it "has been conducting hostile personal and technical surveillance and investigations" of him and his staff.⁸⁸ The bans imposed on the other companies and their employees and contractors are based solely on the Principal Deputy High Representative's allegation that these companies "have relationships with Alpha security."⁸⁹ The banned companies and their employees were given no hearing or other forum to challenge the grounds on which they were suddenly deprived of their livelihoods.

92. These actions demonstrate that violations of BiH citizens' human rights by the use of peremptory removal powers are not merely relics of the immediate post-war years; such actions continue today, some 14 years after the end of BiH's civil war. Where else in the free world—let alone Europe—are persons condemned for supposed wrongdoing, stripped of their positions and employment, and banned from further public positions indefinitely—all by simple decree without any hearing or recourse to appeal?

E. Selective Repeal of Removal Orders

93. On 21 August 2009, the High Representative repealed earlier High Representatives' decrees removing and banning from office four members of the Serbian Democratic Party ("SDS"), including Dragan Kalinic, a former Speaker of the Republika Srpska Parliament and SDS President.⁹⁰ The orders repealing these removal decrees fail to explain why these four men's bans have been lifted while the same sanctions against more than 100 other BiH citizens remain in place. With respect to the rehabilitated individuals, each order simply recites that the High Representative concluded "that the reasons for his removal no longer apply and that he no longer poses a threat to peace implementation, institutional integrity or democracy in Bosnia and Herzegovina." The orders do not attempt to explain why "the reasons for removal no longer apply" or why the four rehabilitated men are no longer "a threat to peace implementation, institutional integrity or democracy" in BiH.

⁸⁸ Supervisory Order Prohibiting Certain Private Security Agencies from Operating in the Brcko District of Bosnia and Herzegovina, 8 June 2009, available at www.ohr.int/ohr-offices/brcko/bc-so/default.asp?content_id=43584.

⁸⁹ *Id.*

⁹⁰ Notice of Decision by the High Representative to Lift the Ban Imposed on Dragan Kalinić by the High Representative Decision, dated 30 June 2004, 21 Aug. 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43881; Notice of Decision by the High Representative to Lift the Ban Imposed on Savo Krunic by the High Representative Decision, dated 30 June 2004, 21 Aug. 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43875; Notice of Decision by the High Representative to Lift the Ban Imposed on Jovo Kosmajac by the High Representative Decision, dated 30 June 2004, 21 Aug. 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43877; Notice of Decision by the High Representative to Lift the Ban Imposed on Nemanja Vasić by the High Representative Decision, dated 30 June 2004, 21 Aug. 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43879.

94. BiH citizens are left to wonder what distinguished these four men from the other banned officials. The rehabilitation of Kalinic, who is seen by some as a potential challenger to the sitting Prime Minister, has raised suspicions that he was rehabilitated in order to pose a challenge to the existing leadership in the upcoming elections.

95. The Government supports the lifting of all OHR bans because the original decrees denied the accused even the barest form of due process or any forum for appeal. The Government is disturbed, however, by the OHR's selective rehabilitation of individuals for reasons that remain – at best – mysterious. The High Representative's rehabilitation of a select few individuals without any explanation of what distinguishes them from those who remain banned highlights the arbitrariness of the OHR's asserted powers.

F. Efforts to Maintain Influence over the Judiciary and Law Enforcement

96. After World War II, as colonies around the world were gaining their independence, some colonial powers maintained their control by leaving in place foreign colonial administrators and military commanders behind a facade of independence. The new High Representative and other interventionists now favor a similar plan for BiH. The Government strongly opposes this tactic. The appointment of foreign personnel as officials in BiH's institutions is not consistent with a return to constitutional government and the rule of law.

97. Under BiH's Constitution, except for three judges of the Constitutional Court, there are no provisions for foreigners to serve as officials in BiH's institutions.⁹¹ However, today there are numerous foreign officials who govern BiH's citizens, including judges and prosecutors in BiH's Court and Prosecutor's Office, and other positions within the Registry (with a staff of over 270) that serves both.⁹² For example, nearly half of the prosecutors in the section of the Prosecutor's Office for Organized Crime, Economic Crime and Corruption are foreigners, including the Deputy Prosecutor who heads that section.⁹³ Most of these officials were originally appointed by decision of the High Representative.⁹⁴

98. These foreign judges and prosecutors are free from the accountability properly imposed on BiH citizens who serve in the same positions. They are granted immunity from criminal and civil liability⁹⁵ at the same level as diplomats under the Vienna Convention on Diplomatic Relations.⁹⁶ Granting such immunity to judges and prosecutors is contrary to fundamental

⁹¹ Constitution of Bosnia and Herzegovina, Art. VI.

⁹² Information on judges of the Bosnia's Court is available at www.sudbih.gov.ba. Information on prosecutors of Bosnia's Prosecutor's Office is available at www.tuzilastvobih.gov.ba. Information on the Registry is available at www.registrarbih.gov.ba.

⁹³ Information on prosecutors of Bosnia's Prosecutor's Office is available at www.tuzilastvobih.gov.ba.

⁹⁴ *See id.*

⁹⁵ The Government reserves its position regarding the legality and enforceability of the immunity in question with respect to non-citizens of Bosnia.

⁹⁶ Decision on Granting a Diplomatic Status to the International Members of the Prosecutor's Office in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina (28/04). The Government

principles of the rule of law and democratic governance. Unlike diplomats, judges and prosecutors exercise considerable authority and discretion over citizens of BiH, including authority to apprehend, prosecute and incarcerate. Such authority and discretion in any jurisdiction can be abused if not checked by mechanisms of accountability. But there is no accountability for foreign judges and prosecutors in BiH.

99. This arrangement has resulted in political manipulation of the criminal justice system. Foreign judges in BiH have strong incentives to obey the OHR and other foreign officials who have been involved in setting their terms of work and compensation. Such criminal justice system abuses have been the subject of inquiries raised within BiH's Parliamentary Assembly.

100. Pursuant to the Law on Court of Bosnia and Herzegovina and the Law on the Prosecutor's Office of Bosnia and Herzegovina, foreigners may serve as judges and prosecutors only during a five-year transitional period, starting in 2004.⁹⁷ This transition period comes to an end this year.

101. The BiH Parliamentary Assembly recently voted to reject amending the law to extend the mandate of these foreign prosecutors and judges. The High Representative on 29 October 2009 expressed his "concern" at the Parliamentary Assembly's decision. He threatened to use his Bonn Powers to extend the mandate, saying that "full BiH co-operation with the ICTY is a priority for my office, and I am ready to use the full powers of my office to assure this if needed."⁹⁸ Yet, as the EC's recent Progress Report on BiH attests, BiH's "cooperation with ICTY has remained good."⁹⁹

102. The Government will oppose any further attempt to change the law to extend the period for foreigners to serve as judges and prosecutors beyond 2009. The High Representative should respect the BiH Parliament's decision not to extend the mandate of the foreign judges and prosecutors. A renewal of their mandate – especially if accomplished through a decree in defiance of the Parliament – would be a giant step back for constitutional government and the rule of law in BiH.

reserves its position regarding the constitutionality of this decision. *See also*, Law on Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, (29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07), which provides criminal and civil immunity for international judges (Art. 65(8)), but no immunity for judges who are citizens of Bosnia. *See also*, Law on the Prosecutor's Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, (24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04), which provides criminal and civil immunity for international prosecutors (Art. 18(a)(3)), but no immunity for prosecutors who are citizens of Bosnia.

⁹⁷ Law on Court of Bosnia and Herzegovina, "Official Gazette" of Bosnia and Herzegovina, (29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07), Art. 65(1). Law on the Prosecutor's Office of Bosnia and Herzegovina, (24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04), Art. 18(a)(1).

⁹⁸ OHR Press Release: Inzko Meets Brammertz: International Mandates Should Be Extended, 29 Oct. 2009.

⁹⁹ EC Progress Report at 24.

G. The Barrage of Unlawful Decrees on 18 and 19 September

103. On 18 and 19 September alone, the High Representative (and Principal Deputy High Representative as Brčko Supervisor) unleashed a barrage of 9 peremptory decrees.

104. One 18 September decree overruled a decision of the BiH Council of Ministers, comprised of representatives of the three Constituent Peoples, on the distribution of financial assets obtained under the Agreement on Secession Issues of the former Yugoslavia.¹⁰⁰ If implemented, the decree would divest the Republika Srpska (and the Federation) of important financial assets. The decree shows that even when BiH's leading parties and institutions reach agreement on necessary measures, the High Representative does not hesitate to trump BiH institutions in order to micromanage the country's internal affairs.

105. In another decree on the same day involving BiH's electric power transmission company, Elektroprenos, the High Representative stripped the Republika Srpska of vital shareholder protections in flagrant violation of the its rights as one of the company's two shareholders.¹⁰¹ On 19 September, the Principal Deputy High Representative and Brčko Supervisor also issued an order that claimed to vest property rights held by Elektroprenos with the Brčko District.¹⁰² If implemented, the order would result in the unlawful expropriation of significant property from the Republika Srpska and its citizens.

106. On 18 September, the High Representative also issued: a decree changing the electricity laws of both the Republika Srpska and the Federation;¹⁰³ a decree amending the Law on

¹⁰⁰ Decision Enacting the Law on the Distribution, Purpose and Use of Financial Assets Obtained Under Annex "C" to the Agreement on the Succession Issues, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43973. In a meeting on 6 November, however, Prime Minister Dodik and Federation Prime Minister Mustafa Mujezinovic reached an agreement to unblock the work of Elektroprenos. *Bosnia leaders agree to allow power grid function*, REUTERS, 6 Nov. 2009. Under the agreement, Elektroprenos will continue to work according to the law that created it, and the High Representative's order will not be implemented. *Bosnian Serb, Federation PM agree to ignore peace envoy's decision on power grid*, BBC MONITORING translation of BH RADIO 1, 6 Nov. 2009.

¹⁰¹ Decision Enacting the Amendments to the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43975.

¹⁰² Supervisory Order regulating the status of all electric power transmission lines and facilities situated in the Brčko District of Bosnia and Herzegovina, 19 Sept. 2009, available at www.ohr.int/ohr-offices/brcko/bc-so/default.asp?content_id=43983.

¹⁰³ Decision Enacting the Law on Amendments to the Law on Electricity (Republika Srpska), 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43965; Decision Enacting the Law on Amendments to the Law on Electricity (Federation), 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43963.

Transmission of Electric Power, Regulator and System Operator of Bosnia and Herzegovina;¹⁰⁴ and orders changing the citizenship laws of BiH, the Republika Srpska, and the Federation.¹⁰⁵

107. As the Government expressed to the High Representative, the barrage of decrees issued on 18 and 19 September violated existing laws of BiH, Republika Srpska, and the BiH Constitution. The actions exceeded the authority of the High Representative and the Brcko Supervisor. As such, the decrees created unnecessary disputes and could not be accepted by the Government. They are each an affront to BiH, its Entities, and the rule of law.

H. OHR Investigation of Politicians, Religious Leaders and Businesspeople

108. Under the Dayton Accords, the High Representative is a foreign diplomat entrusted to assist implementation of the civilian aspects of the Accords. New revelations, however, show that the OHR has been conducting secret investigations of important BiH citizens and alleging criminal conduct in privately circulated reports. OHR documents obtained by the Sarajevo-based newsmagazine *Global* show that the OHR has been secretly investigating political and other local leaders on such issues as money laundering, corruption, organized crime, and terrorist connections.¹⁰⁶ The leaked OHR documents include a diagram of an alleged criminal network that includes the names of most of BiH's top Bosniak leaders in government and other fields.¹⁰⁷ A note on the documents says that they are to be made public for the EU.¹⁰⁸ In an interview about the scandal, the High Representative confirmed the existence of a unit within the OHR that created these documents and that this unit shares documents.¹⁰⁹

109. The OHR has no legal authority to run an intelligence operation and certainly has no authority to provide libelous information secretly to the ambassadors of friendly states. The conduct recently revealed is damaging to the reputations of BiH citizens and BiH itself, and the OHR should be held legally accountable for any harm unlawfully caused. These revelations raise serious concern with respect to privacy rights and OHR interference in the BiH judicial and prosecutorial institutions.

¹⁰⁴ Decision Enacting the Law on Amendments to the Law on Transmission of Electric Power, Regulator and System Operator of Bosnia and Herzegovina, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43961.

¹⁰⁵ Decision Enacting the Law on Amendments to the Law on Citizenship of Bosnia and Herzegovina, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43967; Decision Enacting the Law on Amendments to the Law on Citizenship of Republika Srpska, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43971; Decision Enacting the Law on Amendments to the Law on Citizenship of the Federation of Bosnia and Herzegovina, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43969.

¹⁰⁶ *Teška zloupotreba pečata OHR-a (Heavy abuse of OHR's stamp)*, GLOBAL, 29 Oct. 2009.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Bosnian peace envoy apologizes for publication of OHR analyses on Muslim leaders*, BBC MONITORING translation of interview in DNEVI AVAZ, 3 Nov. 2009.

110. High Representative Inzko, commenting on the scandal, said, “I have not ordered an investigation against any individual or organization outside of the OHR.”¹¹⁰ If this is the case, then it is evident that the OHR is operating outside the control of even the High Representative. The High Representative further said, “I think that my team has not produced any scandal.” His comments highlight the broader scandal that the OHR claims to be completely unaccountable for its use of sweeping powers which violate BiH and international law.

I. Seeking to Impose Constitutional Change at Butmir

111. In October 2009, with the assistance of the OHR,¹¹¹ certain members of the PIC Steering Board crafted sweeping changes to the BiH Constitution and insisted that BiH’s political leaders accept them during hastily organized, closed-door meetings at the military base at Butmir. Only one of the several political leaders invited endorsed the demands.

112. The constitutional changes that were proposed by the EU and US are not technical and few, as those proposing them have falsely claimed; rather, they are fundamental and numerous. They include dramatically changing the structure and competencies of the House of Peoples, House of Representatives, Presidency, and Council of Ministers—calling for a new powerful position of Prime Minister—and the form in which officials were elected. They also sought to transfer certain competencies from the Entities to the state level.

113. The proposed constitutional restructuring would undermine the federal structure and mechanisms established as a matter of binding international law in the Dayton Accords that protect the vital interests of all of BiH’s Constituent Peoples. It is precisely these protections, the essential centerpiece of the Dayton Accords, which encourage cooperation and consensus-building today and make BiH a viable state.

114. Only if constitutional changes result from a transparent, democratic and legal process, as as required by the Dayton Accords and BiH Constitution, and reflect agreement of BiH’s Constituent Peoples will they be accepted as legitimate by BiH citizens and be sustainable. For this reason, they were rejected. In its latest Bosnia Strategy Review, the European Bank for Reconstruction and Development noted: “[C]onstitutional reform cannot be imposed from outside, but will have to be in the first place a result of consensus among the political stakeholders of BiH.”¹¹² High Representative Inzko has recently emphasized that changes to BiH’s Constitution are not possible without a consensus among BiH’s three Constituent

¹¹⁰ *Id.*

¹¹¹ *Statement by the HR/EUSR following the end of Butmir talks*, OHR Press Release, 21 Oct. 2009.

¹¹² *Strategy for Bosnia And Herzegovina*, European Bank of Reconstruction and Development, 4 Sept. 2007.

Peoples.¹¹³ Similarly, UK Ambassador Michael Tatham this month said, “The constitutional changes require a broad political consensus.”¹¹⁴

115. Unfortunately, key Bosniak politicians oppose constitutional change through domestic consensus-building. The current Bosniak member of the BiH Presidency and his party blocked constitutional reform in 2006. More recently, the same member of the Presidency and his party attempted unsuccessfully to block passage of the 2009 constitutional amendment on the Brcko District, which was an element of the PIC’s 5+2 Agenda.

116. To prevent OHR closure, some Bosniak leaders have also refused to cooperate to accomplish other parts of the PIC’s 5+2 Agenda. They are insisting that constitutional changes which they prefer—but do not have the necessary support in BiH to pass through legal, constitutional procedures—must first be imposed. For example, as explained above, Mr. Tihic backed out of his agreement on resolving the state property issue, even after its endorsement by the UN Security Council, the PIC, and the High Representative.

117. Now Mr. Tihic is repeatedly threatening that violence and renewed conflict will result if the constitutional restructuring he supports is not accepted. In October, for example, Mr. Tihic said, “If it continues to go on like this, there is no question there will be conflict.”¹¹⁵ He added, “It’s just a question of what kind of conflict there will be, and is it going to be in three months, six months or one year?” Such statements cannot be tolerated and should be strongly condemned by the international community. Certainly negotiations cannot be conducted in this environment.

J. Conclusion

118. A key objective of the foregoing acts of the High Representative and certain PIC Steering Board members is to *impose* a unitary structure within BiH rather than implement the federal structure that is required by the Dayton Accords and set forth in the BiH Constitution. These acts have hampered the legitimate progress that was underway among the key Serb, Croat and Muslim political leaders. Such imposition is a clear violation of BiH and international law as will be discussed in Section V below.

V. Adherence to International Law

119. The actions of the current High Representative and his staff and certain PIC Steering Board members, as described in the previous section above, not only impede progress and

¹¹³ *Changes in Bosnia only by consensus*, B92, 23 Oct. 2009.

¹¹⁴ *UK envoy urges Bosnian leaders to continue participating in Butmir talks*, BBC MONITORING translation of interview in OSLOBODJENJE, 2 Nov. 2009.

¹¹⁵ Nicole Itano, *E.U. and U.S. Talks Aim to End Bosnia Deadlock*, TIME, 8 Oct. 2009. *See also* Dan McLaughlin, *Last-ditch effort to drag Bosnia out of the mire*, IRISH TIMES, 9 Oct. 2009 (quoting Mr. Tihic saying: “Things have been getting worse. If this trend does not stop, it will lead to conflict, it is just a question of when.”); *Bosniak leader warns of “clashes”*, B92, 15 July 2009 (“Clashes are possible in Bosnia if the work of state institutions is blocked and the Office of the High Representative closes, warns SDA leader Sulejman Tihic.”).

destabilize BiH, such actions are also unlawful. They grossly exceed the legal authority of the High Representative and PIC. They constitute egregious violations of the legal duty not to intervene in matters within the domestic jurisdiction of another State—including with respect to BiH’s “inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state.”¹¹⁶ And they are serious violations of human rights and political and social rights guaranteed by the Constitution of BiH and other international instruments. The High Representative has successfully blocked all attempts of citizens to seek a legal remedy for injury caused by his unlawful actions. The Government has responded to these actions consistent with its rights and obligations under the law.

A. Legal Authority of the Peace Implementation Council

120. The PIC is a self-organized, ad-hoc group of some 52 states and organizations. It is not an international organization in terms of international law. Of primary importance for purposes of this Report, the PIC has not been granted any powers of intervention into BiH’s domestic affairs or foreign relations by the Dayton Accords.¹¹⁷ Neither has the United Nations Security Council granted any authority under Chapter VII or other Charter provisions to the PIC to intervene into or supervise the domestic affairs or international relations of BiH or the Entities,¹¹⁸ although PIC statements and actions have often sought to give the impression that PIC somehow possesses such authority. As a matter of international law PIC declarations and communiqués are no more than statements of the views of PIC member states and organizations. While of interest to BiH as such, PIC communiqués and requirements have no legal force in BiH law or in international law.

121. Unfortunately, PIC communiqués of recent years have concerned themselves with the details of internal affairs of BiH, not with questions of international peace and security. The most recent PIC communiqués have become increasingly intrusive in the internal affairs of BiH.¹¹⁹ To cite just a few of many examples, in its recent communiqués and declarations the PIC Steering Board has taken up such issues as regulations on BiH visas, the investigative actions of the State Prosecutor regarding allegations of local law violations, the jurisdiction of Agreement on a Permanent ITA Co-efficient methodology and establishment of a National Fiscal

¹¹⁶ Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States, G.A. Res. 2625 (XXV) (1970).

¹¹⁷ While some PIC members signed the Dayton Accords as witnesses, such an act has no legal significance. As a leading authority notes, citing the Dayton Accords as an example, “The signature of a witness, however distinguished or powerful, has no legal significance; in itself, it will not make the state of the witness a guarantor of the performance of the treaty.” ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 101 (2d ed. 2007).

¹¹⁸ See, e.g., S.C. Res. 1869 (2009), S.C. Res. 1845 (2008), and S.C. Res. 1785 (2007), which do not use the decisional language required by UN law and practice necessary to empower states or organizations to act as agents of or on behalf of the UN. Compare, e.g., S.C. Res. 1244 (1999) (providing such authorizations in the case of Kosovo).

¹¹⁹ See Communiqué of the Steering Board of the Peace Implementation Council, 30 June 2009; Communiqué of the Steering Board of the Peace Implementation Council, 26 March 2009.

Council.¹²⁰ Such interference in internal affairs is inconsistent with international law. The demands in these communiqués have reached far beyond any legal obligation of BiH under the Dayton Accords or any other obligations of BiH and the Entities under other elements of international law. The Government wishes BiH to have friendly relations with all member states of the United Nations, including those that are members of the PIC; but, these relations must be conducted according to international law, recognizing the sovereignty of BiH and without asserting any threat of sanctions should BiH or the Entities choose not to accept the views offered.¹²¹

B. Legal Authority of the High Representative

122. The Agreement on Civilian Implementation of the Peace Settlement, as set forth in Annex 10 of the Dayton Accords does not give authority to the PIC or any state or group of states or organizations to direct the activities of the High Representative. Instead, the High Representative is an official designated by treaty, Annex 10, to carry out certain specifically identified responsibilities set out in Annex 10.¹²² Indicative of the source of his authority is the fact that the grant of immunity accorded him and his staff in Annex 10 is granted only by BiH and is applicable only to BiH institutions. It is not limitless within BiH and comprehends only actions within the scope of his mandate. Thus in performing his duties he is responsible to the BiH, the Republika Srpska, the Federation and the other parties to Annex 10.

123. His actions and authority can only be measured against a reasonable and legally valid interpretation of the mandate in Annex 10, to which he has the serious legal and moral duty to strictly adhere.¹²³ Such interpretation must be guided by the cannon that an agreement not be construed to give what is not explicitly given and the requirement of interpretation in good faith. In cases where a treaty delegates to an international official responsibilities touching upon domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.¹²⁴ Any actions outside this mandate are *ultra vires* and thus without any force or effect. Such actions could result in internationally wrongful acts for which the High Representative would bear responsibility.

¹²⁰ See, e.g., Declaration by the Steering Board of the Peace Implementation Council, 27 Feb. 2008; Communiqué of the Steering Board of the Peace Implementation Council, 20 Nov. 2008.

¹²¹ See, e.g., U.N. Charter, art. 2; Vienna Convention on Diplomatic Relations, art. 41; Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States, G.A. Res. 2625 (XXV) (1970).

¹²² Agreement on Civilian Implementation of the Peace Settlement (Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina), art. II.

¹²³ See, *inter alia*, Vienna Convention on the Law of Treaties, Sections 26, 31, 32 and cannons of treaty interpretation in general international law.

¹²⁴ See W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT'L L. 231 (1989).

C. No Authority to Use Peremptory Powers

124. Annex 10 does not authorize the High Representative to exercise the so-called Bonn Powers. Based upon what has been said above it is apparent that PIC had no authority to grant such powers to the High Representative; moreover, the language of relevant PIC statements does not purport to authorize the exercise of such powers. Instead, the PIC statement only “welcomes” the High Representative’s “intention” to take certain limited actions in connection with his authority to interpret Annex 10.¹²⁵ Even such limited language is not capable of adding any additional authority to the High Representative because the PIC has no judicial authority or function such as could clothe the High Representative’s actions with legitimacy under international law.

125. Even general knowledge of the circumstances surrounding the conclusion of the Dayton Accords would make it impossible to conclude that the intent of the parties was to grant to a single, foreign official the power to amend constitutions, violate constitutional provisions, enact legislation, create new state institutions, remove democratically elected officials, or violate the human rights guaranteed to BiH citizens.¹²⁶ Certainly the plain language of Annex 10 does not grant such power to the High Representative or any other official, State or international organization. That Annex must be read consistently with the other provisions of the Dayton Accords, including Annex 4, the BiH Constitution, which establish a carefully structured system of government in which powers are allocated and balanced among various organs of government so that democratic governance is assured and the rights of the Constituent Peoples and Entities are protected.

126. Whether used by the High Representative or a European Union Special Representative, exercise of these peremptory powers is inconsistent with the Constitution and international legal commitments of BiH, inconsistent with the general standards of human and civil rights required of members of the European Union, and inconsistent with the most fundamental principles of the rule of law and international law. Their use has been called into question or condemned by many international political and legal experts.¹²⁷ For example, the Council of Europe stated, “... the

¹²⁵ Conclusions of the Peace Implementation Conference, 9 and 10 Dec. 1997, Section XI(2).

¹²⁶ It must also be emphasized that while the High Representative has “final authority” of interpretation with respect to Annex 10, his authority is limited – it must be exercised in accordance with general international law, including the Vienna Convention on the Law of Treaties. See *inter alia* Articles 31 and 32. His “interpretation” of Annex 10 obviously cannot be an excuse for actions of the High Representative that violate international law or exceed his mandate. Indeed, such actions are void or voidable and entail international responsibility.

¹²⁷ See, e.g., Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT’L L. 1 (2004); Steven R. Ratner, *Foreign Occupation and International Territorial Administration; the Challenges of Convergence*, EUR. J. INT’L L. (2005), Vol. 16 No. 4; GREGORY H. FOX, *HUMANITARIAN OCCUPATION* (Cambridge University Press 2008); BERNHARD KNOLL, *THE LEGAL STATUS OF TERRITORIES SUBJECT TO ADMINISTRATION BY INTERNATIONAL ORGANIZATIONS* (Cambridge University Press 2008); Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. INTERVENTION AND STATEBUILDING, Special Supp. 2007; Rebecca Everly, *Complex Public Power Regulation in Bosnia and Herzegovina After the Dayton Peace Agreement*, 5 ETHNOPOLITICS No. 1 (2006); Gerald Knaus and Felix Martin, *Travails of the European Raj*, 14 J.

Assembly considers it irreconcilable with democratic principles, that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse.”¹²⁸ The Constitutional Court of BiH has also held that their use violates the Constitution.¹²⁹

D. No Authority of Security Council

127. The various resolutions of the Security Council having to do with BiH do not purport to assign responsibilities to the High Representative. Indeed, it is unlikely that the High Representative would have any legal authority to accept such responsibilities, as his authority is circumscribed by his Annex 10 mandate. United Nations practice is, of course, to appoint and authorize specifically designated U.N. officials or states to carry out tasks authorized by Security Council resolutions.¹³⁰ In contrast, the High Representative and his functions were created by the parties in Annex 10. Generally the Security Council acts through the Secretary General and his appointed special representatives.¹³¹ The High Representative is not an appointed special representative of the Secretary General. Certainly a scope of authority as extensive as that claimed by the High Representative cannot be implied on the basis of any Security Council Resolution issued.

VI. The Government’s Response to the High Representative’s Unlawful Actions

A. Ending the High Representative and Rejection of the Use of the Bonn Powers

128. As Carl Bildt, the Foreign Minister of the current EU Presidency, as well as others within the international community, have repeatedly stated, it is time for the High Representative to end.¹³² BiH must be treated as a full and equal sovereign member of the United Nations. The continuation of the High Representative seriously impedes this (and also blocks application for

DEMOCRACY, No. 3 (2003); RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION (Oxford 2008); DECONSTRUCTING THE RECONSTRUCTION, Dina Francesca Haynes ed., Ashgate 2008).

¹²⁸ *Assembly debate* on 23 June 2004 (20th Sitting) (see Doc. 10196, report of the Political Affairs Committee, rapporteur: Mr. Kirilov), *text adopted by the Assembly* on 23 June 2004 (20th Sitting).

¹²⁹ *See Bilbija*, AP-953-05 (BiH Const. Ct. 8 July 2006).

¹³⁰ For comparison, see S.C. Res. 1244 (1999) regarding governmental administration in Kosovo and appointment of a Special Representative with detailed administrative powers. It is notable that the Special Representative in Kosovo established an Ombudsperson with authority to review the Special Representative’s actions. UNMIK Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo. In BiH, by contrast, the High Representative has issued orders barring the courts and other BiH institutions from hearing or acting upon complaints of human rights or other violations of law by the High Representative.

¹³¹ *See* S.C. Res. 1244 (1999).

¹³² Asked in a June 2009 interview whether it is time to close OHR, Bildt replied, “Yes. I believe that it is time to give far more responsibility to the BiH politicians.” *Office of the High Representative Should be Closed*, NEZAVISNE NOVINE, 11 June 2009. See also *Diplomats Gather from East and West on Bosnia*, BALKAN INSIGHT, 6 Nov. 2009 (quoting Russian Foreign Minister Sergei Lavrov as saying that Russia would “invest its utmost efforts” to promote OHR’s prompt closure).

EU membership). Closure of the OHR will also ensure the end to the High Representative's violations of Human Rights.

129. However, closure of the OHR is unachievable based on the PIC Steering Board's 5+2 Agenda as formulated.¹³³ First, the High Representative and certain members of the PIC Steering Board have continuously changed the terms for meeting the conditions and objectives, as described in Section IV above. More importantly, a powerful segment of the Bosniaks do not want to see the High Representative closed, at least until the High Representative and certain members of PIC have first imposed restructuring of BiH into a unitary, centralized state, which does not have the necessary support among BiH citizens. Therefore, the Bosniaks have no incentive to cooperate in meeting the conditions and objectives, and can unilaterally prevent fulfillment of the 5+2 Agenda. The international community cannot allow such actions to hold hostage the closure of the High Representative and should remedy this situation.

130. Until such time as the High Representative closes, the Government will not accept any further attempts of the High Representative to use the Bonn Powers as being valid under international law.¹³⁴ In order to fulfill its constitutional responsibilities, the Government has also rejected as legally invalid the High Representative's use on 18-19 September (and the Brcko District Supervisor's order) of the Bonn Powers.¹³⁵

131. As a matter of international law, BiH and the Entities have no legal obligation to consent to the exercise of peremptory powers by the High Representative because their exercise is *ultra vires* and violates international law. As a matter of law such actions have no legal force or effect.¹³⁶ In addition, their implementation would cause BiH and the Entities to violate their own laws and constitutions, human and civil rights treaties, and other obligations under international law.

132. As a matter of policy as well as observance of international law, those supporting a European future for BiH and implementation of the Dayton Accords and the rule of law in BiH should support termination of the position of High Representative and termination of peremptory powers as well. Nearly fourteen years after the Dayton Accords and return of peace to BiH, direct intervention in government administration and law-making by the High Representative and the PIC should end. Instead, as discussed in Section VII below, building internal consensus through the hard work of bargaining and compromise among leaders elected by BiH citizens is the path to long-term stability.

¹³³ As shown in Section V above, the PIC has no legal authority to demand that any such requirements be met or to determine whether or not the OHR remains open.

¹³⁴ Conclusion, Republika Srpska National Assembly, 04/1-012-2-1752/09, 24 Sept. 2009.

¹³⁵ *Id.*

¹³⁶ See, e.g. Eli Lauterpacht, "The Legal Effect of Illegal Actions of International Organisations," in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 89-90 (1969).

B. Ensuring Legal Recourse for Injured Citizens

133. The Government is also seeking the support of the international community, including the European Union and the Council of Europe, for the establishment of an independent forum to remedy human rights violations by the High Representative.

134. For more than a decade, the High Representative has been summarily removing officials in BiH from public office and banning them indefinitely from holding public employment. The High Representative has removed nearly 200 citizens of BiH, including democratically elected presidents, legislators, and mayors, as well as judges, police officials, and public company executives. The High Representative has also taken actions against citizens that deny other rights, such as blocking bank accounts and seizing travel documents indefinitely. As described in Section IV, above, the current High Representative, Ambassador Inzko has continued this practice during the past six months.

135. In spite of the grave injury to the sanctioned individuals, the High Representative allows them no notice of the charges, no hearings, no opportunity to contest the allegations, and no opportunity for appeal.

136. The High Representative's removals and bans, lacking even the most rudimentary form of due process, manifestly violate the sanctioned individuals' human rights. These actions are contrary to the Dayton Accords (including the Constitution and the applicable Human Rights Agreements in Annex 6) and are an affront to general principles of international law, the sovereignty of BiH, and the rule of law. Violations of international law and international agreements of so large a scale undermine the respect for the rule of law and international agreements upon which the EU, other regional and economic and security organizations, and the United Nations itself are founded.

137. In this regard, the removal of public officials by the use of the Bonn Powers also violates the "General Principles" set forth in Article 2 of the Stabilisation and Association Agreement between BiH and the European Communities and its Member States. These principles constitute legal obligations of the parties to the SAA to respect democratic principles and human rights set forth in human rights instruments specified in Article 2 and the rule of law. They have been violated by certain member states of the European Communities that are members of the Steering Board of the PIC because of their endorsement of the High Representative's use of the Bonn Powers. The Presidency of the European Union and the European Commission are also members of the PIC Steering Board. They have also been violated by BiH because of its implementation of removal decisions of the High Representative.

138. These decrees have continued despite their condemnation by the Council of Europe's Parliamentary Assembly, the Venice Commission, the European Parliament's Committee on Legal Affairs and Human Rights, and the Council of Europe's Commissioner for Human Rights.

139. Due to the efforts of the High Representative, those injured by the actions of the High Representative presently have no legal recourse. The High Representative has ordered the institutions and courts of BiH not to review its actions or provide any remedy for BiH citizens for loss or injury flowing from implementation of the High Representative's decisions. The

High Representative has also asserted before the European Court of Human Rights—and the Court has ruled—that the Court lacks jurisdiction to hear claims arising from the High Representative’s actions and that its actions do not engage the responsibility of BiH or other states.

140. In October, the Government wrote to Swedish Foreign Minister Carl Bildt, in Sweden’s capacity as President of the EU, and Council of Europe Human Rights Commissioner Thomas Hammarberg and asked them to work to establish an independent international commission of respected legal experts to give individuals who have been removed from their positions a forum to seek redress. The commission’s mandate would be to determine whether the High Representative’s actions violated applicable human rights law and, in case of violations, to determine the extent of any resulting loss or injury.

141. A mechanism to prevent and remedy human rights violations by the High Representative must be implemented. The Venice Commission some four years ago recommended the end to such action by the High Representative and urged setting up an independent panel of legal experts to address the removals by decree. And more recently, in June 2009, the Council of Europe Commissioner for Human Rights called for a complaints or claims commission to ensure accountability.

142. It is a cherished principle in democratic societies that for there to be a right, there must be a legal remedy. A forum for the citizens of BiH whose rights the High Representative has breached would give them the remedy law demands. A more detailed exposition of this issue is attached as an Annex to this Report.

VII. EU Integration and Constitutional Reform

143. Despite the serious attempts to undermine sustainable progress, as discussed in Section IV, above, the Government is committed to continue working to build a better BiH, including through accession to the EU. However, sustainable progress cannot be achieved through continued outside intervention into local political affairs—by the threat and use of the Bonn Powers or other coercive means—which is fundamentally destabilizing and disruptive of the consensus building and reform efforts of BiH’s own authorities. Nor can the EU accession process be used as an excuse and opportunity to fundamentally reconstruct the BiH Constitution through illegitimate means in a manner that destroys the fundamental protections established by treaty at Dayton of the interests and rights of the Constituent Peoples of BiH. The Government supports integration into the EU and Trans-Atlantic structures and believes these are achievable.

A. No Authority of the High Representative or PIC Regarding EU Accession

144. EU membership is not an obligation undertaken or privilege granted by the Dayton Accords. Issues of accession to the EU, including BiH governmental restructuring, are not matters of peace implementation and thus do not fall within the High Representative’s mandate or scope of authority, nor under the auspices of the PIC.

145. On 16 June 2008 BiH signed a Stabilisation and Association Agreement (“SAA”) with the European Union. Thereafter BiH and the EU have proceeded to undertake a variety of tasks

to coordinate BiH legal structures with those required for membership. Such activities are matters for the parties to the SAA.¹³⁷ The Government supports EU accession and intends to work actively to prepare BiH institutions for accession. The Government recognizes that this is, for all aspiring members, a difficult and lengthy process. But it is not a process to be negotiated with members of the PIC or with the High Representative. To do so could only slow and complicate EU accession negotiations by conducting one round of negotiations with the PIC and High Representative and then being faced with additional or different requirements from the EU. There is neither precedent nor logic in BiH having to negotiate with non-EU member states as to the requirements and modalities of BiH accession.

B. Reform That Preserves the Constitutional Structure

146. Reform must respect the mechanisms and federal structure required by the Dayton Accords to protect the vital interests of the Constituent Peoples of BiH. Similar protections are found in other European states.

147. Replacing this federal structure agreed to in the Dayton Accords with a unitary system would remove the protections essential for each of BiH's Constituent Peoples. It is precisely these protections, the essential centerpiece of the Dayton Accords, that established peace and encourage cooperation and consensus building today and make BiH a viable state. Such protections provided by a federal system of government are hardly unique to BiH. Federal structures in other democracies within Europe and elsewhere have been successful forms of governance for states that consist of diverse peoples.¹³⁸

148. At the same time, the Government recognizes that certain amendments to BiH's Constitution, set forth in Annex 4 of the Dayton Accords, are desirable to improve good governance and to conform to standards required for European Union membership. The Government can agree to various modifications so long as they are made pursuant to the procedures set forth in the Constitution and do not undermine the foundational principles set forth in the Dayton Accords. The Government is committed to supporting these efforts. These include modifications that address the concerns of the Venice Commission regarding consistency with the European Convention on Human Rights.

149. However, constitutional reform in the name of "efficiency" and "functionality" cannot be a cover for restructuring BiH's Constitution to create a unitary state to appease a certain segment of the Bosniak population in BiH. Efficiency and functionality can be achieved in a decentralized, federal state—as is the case of many other countries.

C. OHR Closure, Not Constitutional Change, Required for Application to EU

150. The EU Presidency has made clear that constitutional reform is not a condition for EU application. On 29 September, a representative of the EU Presidency testified to the US Helsinki

¹³⁷ See, e.g., Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, sections 76, 79, 80, 95, 97, 99, 102, 103 and 108.

¹³⁸ Examples include Germany, Spain, Belgium, Switzerland, and Canada, among many others.

Commission: “Let me also say that outstanding constitutional reform in BiH neither is a precondition for OHR closure nor required in order to apply for EU membership.”¹³⁹

151. At the same time, the EU Presidency has made clear that closure of the OHR *is* required for EU application. The EU Presidency identified the existence of the OHR as a “major obstacle” to applying for EU membership, and said that “[a]s long as OHR remains in place, a Bosnian EU membership application cannot be considered.”¹⁴⁰

152. Constitutional change has also never been considered a requirement for the closure of the OHR. The EU has made clear that there is no such requirement for OHR closure. As noted above, a representative of the EU Presidency, in recent testimony to the US Helsinki Commission, stated unambiguously that “constitutional reform” is not “a precondition for OHR closure.”¹⁴¹ The PIC has also made clear its position that constitutional restructuring is not required for closure of the OHR. The PIC’s 5+2 Agenda for OHR closure has never mentioned constitutional reform. In its most recent Communiqué, the PIC Steering Board stated, “While constitutional reform is not a part of the objectives and conditions for the OHR’s closure it remains an essential priority.”¹⁴²

D. Proper Reform Sequence and Process

153. According to the positions of the EU and PIC, as described above, the issue to be focused on to advance EU membership application is not constitutional reform, but closure of the OHR. Once the EU candidacy is completed, then is the time for addressing what constitutional reforms may be required for EU *accession*.

154. The timing of such reforms should also take into account the situation in BiH and the needs of the country. If the interests of BiH’s citizens are to be given priority, the most pressing issue facing BiH is not constitutional reform, but economic development to meet the difficult global financial crisis. This should be the primary focus of the international community at present.

155. When reforms are taken up, the process must be conducted in accordance with the legal procedures for amendment required by the Constitution. To be considered legitimate by the citizens of BiH, the reform process must be transparent and public debate encouraged. As in other constitutional democracies, reform of the Constitution, as compared to legislation and regulations, must be approached with great care. It is essential to allow the time required to build a high level of consensus.

156. Constitutional reform and EU accession are domestic issues for BiH’s citizens to control. Attempts to impose reforms by the High Representative, PIC, or other members of the

¹³⁹ Address of Bjorn Lyrvall, Director General for Political Affairs, Ministry for Foreign Affairs of Sweden/Presidency of the EU to the U.S. Helsinki Commission, 29 Sept 2009, at 8.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Communiqué of the Steering Board of the Peace Implementation Council, 30 June 2009.

international community would be both counterproductive to legitimate and enduring reform and an unlawful intrusion into the domestic affairs of a sovereign state.¹⁴³

E. The Failure of Butmir

157. As described in Section IV, above, with the assistance of the OHR, certain members of the PIC Steering Board attempted to restructure the BiH Constitution by crafting new sweeping changes to the Constitution and insisting that BiH's political leaders accept them during closed meetings at the military base at Butmir. Only one of several political parties—the Bosniak SDA party—endorsed these demands.

158. This attempt to change the BiH Constitution failed for several reasons. First, the constitutional changes that were proposed by the EU and US were not technical and few, but fundamental and numerous. They include dramatically changing the structure and competencies of the House of Peoples, House of Representatives, Presidency, and Council of Ministers—calling for a new powerful position of Prime Minister—and transferring certain competencies from the Entities to the state level. The proposed constitutional restructuring would raze the federal structure and mechanisms set forth in the Dayton Accords that protect the vital interests of *all* of BiH's Constituent Peoples. It is precisely these protections, the essential centerpiece of the Dayton Accords, which encourage cooperation and consensus-building today and make BiH a viable state.

159. Second, the Butmir process failed because it attempted to bypass the legitimate, democratic, and legal process required to change the BiH Constitution. The changes were prepared and presented in a nontransparent manner, and demands on the parties were made to accept it only in its entirety. Changes to the Constitution must be accomplished through a transparent, democratic and constitutional process that reflects the will of the Constituent Peoples in order to achieve legitimate and sustainable reform.

160. An additional reason for their failure was the attempt to change the 5+2 Agenda to a 5 + 2 + 1 Agenda, with the new condition being restructuring of the Constitution. Butmir was really an effort to appease the main Bosniak parties' desire to centralize the government and marginalize the Entities by locking in constitutional reforms *before* the High Representative closes. The Bosniaks know that the reforms they seek do not have the necessary support of the citizens of BiH and their elected representatives. Thus, they seek to achieve their reforms through pressure and imposition of the PIC and High Representative. Unfortunately, some within the international community who support muscular intervention and the demise of the Republika Srpska, support this endeavor. This attempt to satisfy some Bosniak politicians' desire for a unitary state before the OHR's closure undermined the hosts' credibility as neutral mediators.

¹⁴³ Such action would violate, e.g., Article 2 of the UN Charter and general principles of international law as evidenced, *inter alia*, by General Assembly Resolution No. 2625 Annex of October 24, 1970.

VIII. Conclusion

161. The Government remains committed to long-term peace and stability in BiH. But the way forward for progress in BiH must be based on adherence to the following principles:

- International law and rule of law must be adhered to by all parties, including the international community and especially the High Representative.
- The High Representative (and peremptory powers) must come to an end; a legal remedy must be made available for individuals whose rights have been violated by the High Representative.
- BiH must be treated as an equal and fully sovereign state free from international intervention in its domestic affairs.
- Constitutional reform must be accomplished through a transparent, democratic and constitutional process in order to achieve legitimate and enduring reform.
- The accession process to the EU and Euro-Atlantic structures—including so-called “reforms” in the name of “efficiency” and “functionality”—must not be a guise for fundamental restructuring of the Constitution that removes safeguards set forth in the Dayton Accords that brought about and ensure peace. The rights and competencies of the Entities as established in the Dayton Accords must be respected.

162. Finally, as the Government stated in its first Report to the Security Council, the Security Council should support the Dayton Accords as the binding legal framework for BiH. The agreements that constitute the Dayton Accords, including the BiH Constitution set forth in Annex 4, are the legal instruments to which the relevant parties are bound as the framework for “enduring peace and stability”¹⁴⁴ in BiH. As a fundamental principle of international law and pursuant to BiH domestic law, these cannot be amended or modified except by further agreement of the relevant parties. Attempts to impose a system of governance that is inconsistent with the Dayton Accords by foreign states or international organizations by the exercise of peremptory powers or other methods will not be legally valid nor will such actions have the support of BiH citizens.

163. Democracy, good governance and the rule of law cannot continue to develop within BiH, if the fundamental principles of democracy, good governance, and the rule of law are repeatedly violated by the very international representatives who claim to seek their establishment. The consensus on which the legitimacy of all governments ultimately rests must come from within.

¹⁴⁴ General Framework Agreement for Peace In Bosnia and Herzegovina (Preamble).

ANNEX

Citizens Whose Human Rights Have Been Violated by the High Representatives Must Have Legal Redress

I. The OHR's Use of the Bonn Powers to Remove Officials Violates Fundamental Human Rights and Binding International Agreements

A. The OHR's Political Tactics to Remove Individuals from Public Office and Employment

Since 1997 when the High Representative first claimed the so-called Bonn Powers, the High Representative has removed nearly 200 persons from public positions.¹ Among those removed have been:

- dozens of democratically elected officials, including legislators, mayors, governors, the Croat member of the BiH Presidency, and a president of Republika Srpska;
- sitting judges;
- police officials;
- lawyers for local housing agencies; and
- officials of public companies.

The High Representative's removals have usually included indefinitely banning the targeted persons from any public office or employment and often even from holding office in political parties. These removals were effected simply by decree of the High Representative, without any notice or hearing, administrative or judicial process or recourse to appeal, in gross violation of fundamental human rights of those individuals against whom such actions were taken.

These violations of human rights by the use of peremptory removal powers are not merely relics of the immediate post-war years; they continue today, some 14 years after the end of BiH's civil war. As recently as 6 June 2009, the High Representative removed two senior police officials from their positions, alleging that Radislav Jovićić of the State Investigation and Protection Agency of BiH was conducting surveillance against the OHR and that Himzo Đonko, the Police Commissioner of Herzegovina-Neretva Canton in the Federation, was threatening international staff of the OHR in order to obstruct an inquiry into his alleged abuse of office. The High Representative banned both police officials from any public positions indefinitely.

Despite the severe harm to their livelihoods and reputations, Jovićić and Đonko were afforded no notice of the charges, no hearing before an impartial body to challenge the allegations underpinning the decisions, and no recourse to appeal. Indeed, the entire prosecutorial and judicial system established within Bosnia and Herzegovina ("BiH") was wholly circumvented.

¹ This number does not include the exercise of peremptory decree and removal powers by the Deputy High Representative with respect to the Brčko District, which has occurred frequently and recently. Nor does the number include 598 police officers banned for life from the profession as a result of the UN International Police Task Force's decertification decisions, supported by the High Representative.

The process by which the police officials' rights were stripped from them was conducted behind closed doors without even a pretence of transparency or rule of law. The High Representative emphasized that these decisions have "immediate effect and will not require any further procedural steps."

The pattern used by the High Representative is to simply make allegations of wrongdoing against an individual, without providing detailed information or evidence, and then remove him from office by decree, often banning him indefinitely from elections, party positions and public employment. Often there is not even any attempt to seek legal action against the persons removed, despite the High Representative having leveled allegations against them that, if true, would usually amount to unlawful and even criminal conduct.

B. Violation of Human and Civil Rights Obligations

Exercise of peremptory removal powers is inconsistent with the general standards of human and civil rights required of members of the European Union and all states party to the human and civil rights treaties to which BiH is a party. As agreed in the Dayton Accords and the BiH Constitution, BiH has entered into 16 human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the 1966 International Covenant on Civil and Political Rights; and the 1966 Covenant on Economic, Social and Cultural Rights.² BiH is also a party to the Helsinki Final Act. Moreover, under the Dayton Accords and BiH Constitution, it is required that "[t]he general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."³

Among the legal principles to which BiH is committed by virtue of these provisions of the Dayton Accords and other treaties are ensuring its citizens:

- the right to an effective remedy;
- the right to a fair hearing;
- no punishment without law;
- freedom of expression;
- freedom of assembly and association;
- right to free elections;
- protection of property; and
- the right to take part in public affairs.

The peremptory powers of removal used by the High Representative are in direct contravention of these fundamental principles. Moreover, the decision to remove persons from public positions places BiH and its institutions in the position of violating the BiH Constitution by virtue of their implementing the High Representative's decisions.

² See BiH Constitution, Art. II.2 and Ann. 1; General Framework Agreement, Ann. 4 and Agreement on Human Rights, General Framework Agreement, Annex 6.

³ BiH Constitution, Art. III.3.b; General Framework Agreement, Ann. 4.

C. Violation of the Stabilisation and Association Agreement

The use of the Bonn Powers to remove officials from office is also in violation of the Stabilisation and Association Agreement between Bosnia and Herzegovina and the European Communities and its Member States, signed in Luxembourg on 16 June 2008 (“SAA”). The SAA, under TITLE I GENERAL PRINCIPLES, at Article 2 provides:

Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for principles of international law, including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement. (emphasis added)

The High Representative’s removal of citizens from public positions through the use of the so-called Bonn Powers is contrary to these obligations set forth in the SAA, namely, respect for democratic principles, human rights, principles of international law, and the rule of law. Moreover, respect for these principles, which constitutes a legal obligation of the parties to the SAA, has been violated by BiH because of its implementation of decisions of the High Representative. They have also been violated by certain member states of the European Communities that are members of the Steering Board of the Peace Implementation Council (“PIC”) because of their endorsement of the High Representative’s use of the Bonn Powers. These foreign states include the following member states of the European Communities that are also PIC Steering Board members: France, Germany, Italy, and the United Kingdom. The Presidency of the European Union and the European Commission are also members of the PIC Steering Board.

The Office of the High Representative, as a defendant before a US federal court, has recently stated that it is an organ of the foreign states that make up the PIC, and as such it constitutes an instrumentality of each of those states.⁴ In addition, the Office of the High Representative asserted before the court that the High Representative, when acting in his official capacity, is acting as an employee of the foreign states.⁵ If, as the Office of the High Representative claims, it is an organ or instrumentality of these foreign states, its actions are attributable to such states as are the actions of the High Representative.

⁴ Specially Appearing Defendants’ Motion to Dismiss, *Anthony Sarkis v. Mirolsav Lajcak, Office of the High Representative*, U.S. District Court for the Northern District of California, 31 October 2008, p. 11.

⁵ *Id.* at p. 14.

D. The Constitutional Court of BiH

The Constitutional Court of BiH has condemned the High Representative's use of the Bonn Powers to remove public officials as violating the human rights instruments guaranteed in the Constitution.⁶ In the case, *Appeal of Milorad Bilbija et al*, two senior officials were removed by decision of the High Representative from their respective positions as (1) Deputy Head of the Operative Administration of the Intelligence and Security Agency in Banja Luka and (2) Chairman of the National Assembly of Republika Srpska and President of the Serb Democratic Party. The applicants were also barred from holding other public and party duties, holding any official, elective, or appointed public or party office, and running in elections. The applicants argued that the High Representative's decision had violated their rights under the European Convention on Human Rights.

In response, in July 2006, the Constitutional Court concluded that:

In examining the formal aspects of the challenged decision and similar decisions of the High Representative including the consequences for the persons concerned, the Constitutional Court holds that such decisions have seriously raised issues of the existence of violations of some rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention. Among others, the Constitutional Court notes that impossibility to challenge the decisions of the High Representative leaves such persons without any protection of their rights and fundamental freedoms.⁷

The Court went on to hold that:

The appellants' right to an effective legal remedy under Article 13 of the European Convention has been violated due to lack of an effective legal remedy within the existing legal system of Bosnia and Herzegovina, which could be pursued against the decisions of the High Representative concerning the rights of individuals . . .⁸

E. The Council of Europe

The Council of Europe has also sharply criticized the High Representative's use of the Bonn Powers to remove persons from public office and employment. In 2004, before the BiH Constitutional Court's *Bilbija* decision, Council Resolution 1384 stated that "the Assembly considers it irreconcilable with democratic principles, that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their

⁶ Appeal of Milorad Bilbija et al, No. AP-953/05 (8 July 2006).

⁷ See *id.* at para 36.

⁸ See *id.* at para 77.

validity and without there being a legal recourse.”⁹ In a March 2005 opinion, the European Commission for Democracy through Law (“Venice Commission”) said of the OHR’s decisions:

The termination of the employment of a public official is a serious interference with the rights of the persons concerned. In order to meet democratic standards, it should follow a fair hearing, be based on serious grounds with sufficient proof and the possibility of a legal appeal. The sanction has to be proportionate to the alleged offence. In cases of dismissal of elected representatives, the rights of their voters are also concerned and particularly serious justification for such interference is required. . . .

The main concern is . . . that the High Representative does not act as an independent court and that there is no possibility of appeal. *The High Representative is not an independent judge and he has no democratic legitimacy deriving from the people of [Bosnia and Herzegovina]. He pursues a political agenda As a matter of principle, it seems unacceptable that decisions directly affecting the rights of individuals taken by a political body are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent court.*¹⁰ (emphasis added)

More recently, on 3 June 2009, the Committee on Legal Affairs and Human Rights of the European Parliament issued a report entitled, “The state of human rights in Europe: the need to eradicate impunity.” This report provides:

The role of international actors is on the increase world-wide. . . . Some of them commit mistakes, even crimes, which have victims that deserve justice. . . . Rather than making it even more difficult to hold perpetrators of human rights violations responsible where these occur during operations under international mandate, the international community should set a positive example of transparency and accountability.¹¹

And on 6 June 2009, the Commissioner for Human Rights of the Council of Europe wrote about the need for international organizations acting as quasi-governments to be held accountable for their actions, citing the OHR as an example.¹² He wrote: “When international organisations exercise executive and legislative control as a surrogate state they must be bound by the same

⁹ *Assembly debate* on 23 June 2004 (20th Sitting) (see Doc. 10196, report of the Political Affairs Committee, rapporteur: Mr. Kirilov), *text adopted by the Assembly* on 23 June 2004 (20th Sitting).

¹⁰ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, paras. 94-96 (Venice, 11-12 March 2005).

¹¹ Report, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, *The state of human rights in Europe: the need to eradicate impunity*, para. 6, 3 June 2009 (Doc. 11934).

¹² Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, 6 June 2009, at www.coe.int/t/commissioner/Viewpoints/090608_en.asp.

checks and balances as we require from a democratic government. . . . No-one, especially an international organization, is above the law.”¹³

Ironically, less than a month before the High Representative’s illegal removal of two officials on June 9, the OHR issued a press release quoting him as stating: “[T]he rule of law is based on a simple truth – that everyone is born equal, therefore is equal before the law and nobody is above or beyond the law.”¹⁴

II. Those Injured by the High Representative’s Violation of Human Rights Presently Have No Legal Recourse

A. The High Representative Has Blocked All Recourse within the Courts and Institutions of BiH for Those Persons Whose Human Rights Have Been Violated

On 23 March 2007, in response to the Constitutional Court’s *Bilbija* decision, in which the Court held, described above, that the High Representative’s use of removal powers violated fundamental human rights protected by the Constitution, the High Representative issued an order purporting to overrule the Constitutional Court and going well beyond.¹⁵ The order declared the High Representative to be entirely above the rule of law and not subject either to review by the Constitutional Court (or otherwise) or responsibility for any actions taken, regardless of their consequences. The order declared that the Bosnian State has no power to protect the constitutional and international legal rights of its citizens where the actions of the High Representative are directly or indirectly at issue. The order decreed that no liability is capable of being incurred by any institution or authority of BiH in respect of any loss or injury flowing from the implementation of its decisions.

The language of the order is a clear demonstration of the High Representative’s contempt for human rights and the rule of law:

“Any step taken by any institution or authority in [BiH] in order to establish any domestic mechanism to review the Decisions of the High Representative . . . shall be considered by the High Representative as an attempt to undermine the implementation of the General Framework Agreement” (Article 2)

“[A]ny proceeding instituted before any court in [BiH], which challenges or *takes any issue in any way whatsoever* with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent.” (Article 3) (emphasis added)

¹³ *Id.*

¹⁴ *No Individual Can Be Above the Law; There Can Be No Space Beyond the Law*, OHR Press release of 14 May 2009, available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=43474.

¹⁵ See Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (23 March 2007).

“[N]o liability is capable of being incurred on the part of the Institutions of the [BiH], and/or any of its subdivisions and/or any other authority in [BiH], in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decisions of the High Representative made pursuant to his or her international mandate *or at all*.” (Article 3) (emphasis added)

“[T]he provisions of the Order contained herein are . . . laid down by the High Representative pursuant to his international mandate and are not, therefore, justiciable by the Courts of [BiH] or its Entities *or elsewhere*, and no proceedings may be brought in respect of duties thereof before any court whatsoever at any time.” (Article 4) (emphasis added)

“[T]he High Representative is not in any way accountable to any one State . . . his actions cannot engage the responsibility of any one State” (Preamble)

B. The High Representative Has Blocked the European Court of Human Rights as a Possible Forum for Citizens to Seek Redress and Has Asserted that Its Actions Do Not Engage the Responsibility of Any State

In October 2007, the European Court of Human Rights dismissed on jurisdictional grounds the claims of BiH citizens who had been removed from public positions by the High Representative’s use of the Bonn Powers. In this case, *Beric v. Bosnia and Herzegovina*, the Court did not decide on the merits of the claim that the actions of the High Representative violated human rights. Rather, it held that it lacked jurisdiction to decide the claim.

Although not party to the claim, the High Representative filed a comprehensive submission to the court as “Written Observations.” In its Observations, to avoid the Court finding that its actions could be reviewable, the High Representative argued that its actions were not attributable to BiH or any other state because:

1. The High Representative is an international organization (not subject to the Court’s jurisdiction which is limited to member states of the European Convention);
2. The High Representative is not subject to the control of any State and thus its acts are not subject to challenge in the courts of any State;
3. The High Representative is not an organ of any State and its actions do not engage the responsibility of any State as a matter of international law.

In reliance upon the High Representative’s arguments, the Court held that it lacked jurisdiction over the claim,¹⁶ thus preventing the two removed officials from having their claim reviewed by the European Court.

¹⁶ *Beric et al v. Bosnia and Herzegovina*, paras. 26-30, ECHR 2007.

C. The High Representative has attempted to block all legal recourse to those who are the subject of its removal orders

By its Order in response to the BiH Constitutional Court and its intervening in the European Court of Human Rights, the High Representative has made every effort to prevent any kind of review of its removal decisions. The High Representative declared and ordered that institutions within BiH, including its courts, should have no authority to review its removal decisions to provide a remedy for human rights claims or otherwise. The High Representative asserted and the European Court held that it could not review and determine whether BiH citizens were injured by the violation of their human rights due to implementation of the High Representative's decisions. If the High Representative's actions do not violate protected human rights, then why does the High Representative oppose their review by an independent judicial body? Why do the citizens of BiH, a sovereign state and member to the European Convention on Human Rights and the Council of Europe, not enjoy the same fundamental human rights as citizens of other member states? It is unconscionable that citizens within Europe can be removed from public office and employment—often banned indefinitely—by arbitrary decree, without any hearing, review, minimal due process, or opportunity to appeal.

III. A Mechanism to Remedy Human Rights Violations by the High Representative Must Be Implemented

A. Institutions responsible for protecting human rights in Europe have long called for the end of the High Representative's removals by decree and for a mechanism to remedy human rights violations caused thereby

In its March 2005 opinion on the High Representative's removal powers, the Venice Commission called for these decisions to be transferred to "the proper national institutions" and "made subject to full judicial control."¹⁷ The Commission held that "[t]he continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable."¹⁸ As described above, the Parliamentary Assembly and Commissioner for Human Rights of the Council of Europe, along with many other scholars and experts, have condemned the manner in which the High Representative has used the Bonn Powers to summarily remove individuals from office. *Thus the necessary and immediate step to prevent further violations of BiH citizens' fundamental human rights is for such actions to end.*

In addition, those individuals whose human rights have been violated must have a mechanism through which they may seek legal recourse, a point which has been long recognized. In this regard, the Venice Commission in 2005 had proposed that the Security Council set up a special body to review the cases of some 150 BiH police officers who challenged their lifetime bans

¹⁷ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, para. 97 (Venice, 11-12 March 2005).

¹⁸ *Id.* at para. 98.

from the profession.¹⁹ Also in 2005, the Venice Commission recommended “setting up an independent panel of legal experts”²⁰ to address the High Representative’s removals by decree.

In addition to the Venice Commission, more recently, in June 2009, the Council of Europe Commissioner for Human Rights called for a complaints or claims commission to ensure accountability.²¹

B. An independent international commission should be established immediately to provide recourse to parties who have been injured by the High Representative’s violations of human rights

The international community should establish an independent international commission comprised of respected and experienced international jurists to provide individuals who have been removed from their public positions a forum to seek redress.²² The commission mandate would be to determine whether the actions of the High Representative violated applicable human rights law and, in case of violations, to determine the extent of any resulting loss or injury. The commission could be given authority to issue interim measures as necessary to protect the rights of individuals. The commission would be required to make its decisions in accordance with general international law, including the law of state responsibility and responsibility of international organizations. The commission could sit in The Hague or some other neutral location in Europe and employ the services and procedural rules of an experienced and respected institution such as the Permanent Court of Arbitration. Given that members of the international community have been calling for a mechanism for nearly five years, the establishment of this commission should be completed this year.

C. The creation of an independent international commission is supported by Annex 6 of the Dayton Peace Accords

Annex 6 of the Dayton Peace Accords, at Article XIII: *Organizations Concerned with Human Rights*, provides:

The Parties join in inviting the United Nations Commission on Human Rights, the OSCE, the United Nations High Commissioner for Human Rights, and other

¹⁹ European Commission For Democracy Through Law (Venice Commission), *Opinion on a Possible Solution to the Issue of Decertification of Police Officers in Bosnia And Herzegovina*, adopted by the Venice Commission at its 64th plenary session, para. 97 (Venice, 21-22 October 2005). The UN International Police Task Force, with the High Representative’s support, banned 598 police officers for life through its decertification process. The High Representative strongly resisted any review of these decisions in Bosnian courts.

²⁰ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, para. 98 (Venice, 11-12 March 2005).

²¹ Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, 6 June 2009, at www.coe.int/t/commissioner/Viewpoints/090608_en.asp.

²² The Republika Srpska proposes the establishment of an independent international commission, While reserving its position as to the jurisdiction of the European Court of Human Rights, the BiH Constitutional Court, and other existing adjudicatory bodies.

intergovernmental or regional human rights missions or organizations to monitor closely the human rights situation in Bosnia and Herzegovina

It is incumbent upon these organizations to actively oppose further violations of human rights by the High Representative and work to ensure a remedy is available for those individuals who have been injured by his past actions.

IV. Conclusion

Nearly 200 citizens of BiH have been removed from office by the High Representative by decree, without any notice or hearing, administrative or judicial process, or opportunity to appeal. These actions of the High Representative, as recognized by the Constitutional Court of BiH and the Council of Europe, violate fundamental human rights. Those who are the subject of the High Representative's actions presently have no legal recourse due to the actions of the High Representative to prevent this. The Dayton Peace Accords not only protect such human rights but also call upon international organizations to act for their protection. To provide legal recourse to individuals who have been removed from public office or employment by the High Representative, an independent international commission must be established. No legal or moral basis exists to justify this unconscionable and continuing violation of fundamental human rights.